

## The Central Law Journal.

ST. LOUIS, SEPTEMBER 17, 1886.

### CURRENT EVENTS.

**DIVORCE AFTER DEATH.**—The English courts seem to have run this summer into a shoal of queer lawsuits. We noted, some weeks ago, the "Great Rat Case," in which, in our judgment, the rats were magnified out of all due proportion to the other *dramatis personæ*, and now two courts have successively tackled the problem whether a man may be divorced after his death. The London *Law Times* says:

"The law contains many subtleties and some fictions, but we are saved from the absurdity of divorcing a man after his death. Sir James Hannen decided that this could not be done, and the Court of Appeal have affirmed his decision in *Stanhope v. Stanhope*, 55 L. J. Rep. P. D. & A. 37, reported this August. Why anyone should wish a man to be divorced after his death, would seem a mystery, but in this instance the desire was practical enough."

The explanation is that the deceased held a life estate in £15,000, remainder to his wife for life, remainder to such persons as he might appoint by will. By his will he appointed his brother and sister. Before his death he had obtained, against his wife, a decree *nisi* of divorce, but under the statute, such decree could not become absolute until after the lapse of six months. Within that time he died, and the suit for divorce abated. Now, if the person, who had been his wife, was his widow, she was entitled to £15,000 for life, and his brother and sister to the remainder, under his appointment, after her death. If, however, she was not his wife when he died, nor of course his widow after his death, her life estate never took effect at all, nor did that of the brother and sister, which could only commence upon the termination of her life estate. Upon this theory at least, the executor proceeded in the interest, as he conceived, of the parties interested in the estate. He filed a petition asking that the divorce suit be revived, and that the decree *nisi* be made absolute, evidently

under the impression that the decree making the divorce absolute would relate back to the time at which the decree *nisi* was rendered, and that thereby the marriage relation was terminated within the lifetime of the husband, and that the legal consequence followed, that the life estate of the wife, and the dependent remainder of the brother and sister, were extinguished with it.

The court refused the application for a number of good reasons, the best of which is thus expressed by Lord Justice Bowen:

"In my opinion a man can no more be divorced after his death than he can be married or condemned to death. Marriage is a union for two lives, it can be dissolved either by death or by process of law. After it has been dissolved by one of these ways, it cannot be dissolved again—a knot which has been already untied cannot be untied again." In the embarrassment of reasons why the motion should not be granted, this way of putting the case seems the neatest.

**PATENT LAW AND PATENT PRACTICE.**—One of the dark corners of his profession, to the average practitioner, is the Patent Law of the United States. This subject has been so long turned over to specialists, and its practice so completely absorbed by them, that it is really no disparagement to even the best informed lawyers to say that they know very little about it. Nevertheless the subject is of such great interest to the people of the United States, that the character, terms and operation of the existing statutes regulating patents, and especially their exposition and administration by the courts, are worthy of much more attention than they have ever received from the profession or the general public.

In a recent issue of the *Albany Law Journal*, appears an article significantly entitled: "Shall the Patent Laws be Repealed?" Upon examination, however, it appears that the *gravamen* of the charge consists less in depreciation of the patent laws themselves, as a desirable and effective means of fostering enterprise, and stimulating genius, as in a very bitter denunciation of the methods in which those laws are administered in the Federal Courts.

From the article under consideration, it would appear that, in patent cases in Federal Courts, all the shameful abuses of the old English High Court of Chancery are reproduced in all their enormity. The delays are interminable and inexcusable, the costs and expenses are immense, and in the end, as Louis XIV. said, with reference to his contest with the emperor and his allies: "It is the last crown-piece that wins."

How all this may really be, we do not pretend to say. We tell the tale as it is told to us—and to all the world, in the pages of our contemporary, by a patent lawyer, over his own signature. We are strongly inclined to the opinion that there is a good foundation for these charges, and that this dark corner in Federal jurisprudence might well bear, not a little, but a good deal of illumination. The interests of the public, we are persuaded, would be greatly subserved by a thorough investigation of the whole subject of the patent laws, and especially of the procedure of the Federal Courts in their administration, followed by appropriate legislation. We are strengthened in this opinion by our knowledge of the methods of the Federal Courts, in the matter of receivers, and their arbitrary and unreasonable extension of the authority and functions of those officers. This matter has long been the subject of criticism in professional circles, and has been commented on with great severity by one of the most eminent and distinguished justices of the Supreme Court of the United States,<sup>1</sup> who portrays in the most masterly manner the abuses and injustice which has grown out of the prevalent perversion of the functions of a receiver.

It is not unreasonable to expect that a proper investigation will disclose the existence of wrongs, equally flagrant, in the administration of the Patent Laws, of unnecessary delays which operate a denial of justice, and costs and expenses which amount to confiscation.

The *Albany Law Journal*, commenting on its correspondent's communication, says:

"It is notorious that most poor inventors are cheated out of their rights by the oppression of capitalists, and the tediousness, in-

equality and expensiveness of the practice in the patent courts. We have no doubt, too, that some of the Federal judges carry on things with a high hand when the mood is on them. This comes of making them independent of the people whose servants they are. It is a wholesome thing to have a judge to know that he is liable to step down and out at a fixed time if he does not behave himself. A judicial tyrant is the worst sort."

We are hardly prepared to endorse the extreme and radical remedy for the evils of the patent law procedure, which is suggested in the last three sentences of this extract. We are not as much addicted to iconoclasm as our contemporary, and hesitate to assail *à l'outrance*, and without appropriate preliminaries, so venerable and venerated an idol as the life-tenure of Federal judicial office. Milder measures are first in order, and, contrary to the philosophy of the spelling book fable, we would use tufts of grass first to dislodge the naughty boy from the apple-tree, before "trying what virtue there is in stones."

#### NOTES OF RECENT DECISIONS.

PLEDGE — COLLATERAL SECURITY — LEGAL TENDER. — The Supreme Judicial Court of Massachusetts recently decided a case of some interest,<sup>1</sup> illustrating the relation between the pledgor and pledgee of personal property as collateral security for the payment of a debt. Freeland, the plaintiff's testator, had borrowed, from the defendant, \$24,000, and deposited with it certain certificates of stock of the estimated value of \$28,000. Before the maturity of the note, Freeland died, and afterwards plaintiff, as his executor, offered to pay the note and demanded back the stock certificates. The defendant refused to deliver the certificates because they had been mislaid.

Time passed and nothing definite was done. The plaintiff, by the delay, lost the opportunity of selling the stock for \$28,000, which he could have done when he offered to

<sup>1</sup> Mr. Justice Miller, in *Barton v. Barbour*, 104 U. S. 137.

<sup>1</sup> *Cumlock Extr. v. Institution for Savings, etc.*, July 3, 1886, 2 N. Eng. Rep. 538.

pay the note, and when finally the certificates were found and the plaintiff did pay the note, the stock had so far depreciated that he lost \$700 by the sale, that being the difference between the amount realized and that which he had been offered when he demanded the certificates and proposed to pay the note. He therefore sued for the \$700, the amount so lost, and set forth the foregoing facts in his declaration. The defendant demurred to the declaration on the ground that it did not state a sufficient cause of action. The court below sustained the demurrer, and the appellate court affirmed the judgment.

At first view of this matter, it would appear, not only that it was a case of hardship, but that both courts were in the wrong. A little consideration, however, will show that they were right. The defendant's carelessness in losing the certificates caused the loss to the plaintiff of the seven hundred dollars, but in order to fix its liability for the loss, it was necessary for the plaintiff to take the appropriate legal steps. A legal tender was necessary to stop interest, to preclude liability for costs, and to fix upon the defendant responsibility for consequences. A mere offer to pay is not a legal tender.<sup>2</sup> "A tender is a production and manual offer of the money, and regularly it should be counted down.,"<sup>3</sup> To say, "your money is ready for you," or "the money is in my pocket," is not a tender. To fix the liability for consequences on the defendant, the tender of it should have been regularly made and averred in the declaration, and the want of such an averment was sufficient to sustain the demurrer.

The Massachusetts cases declare that a tender is necessary to enable the pledgor to maintain trover against the pledgee.<sup>4</sup> The contract of pledge is collateral to the contract to pay the debt, the promise is to return the pledge when the debt is paid. Hence it is concluded by the court, that the payment (or, presumably, tender) of the amount, is a

condition precedent to the right of the pledgor to demand the pledge. In this respect the two contracts, one to pay and the other to return the pledge upon payment, differ from a bi-lateral executory contract of two parties promising mutually to do concurrent acts.<sup>5</sup> In this latter case, all that can be required of either party, is, at the proper time and place, to declare his readiness to perform his part of the contract, and to demand a like readiness and performance from the other party.<sup>6</sup> Such, however, as the court decided, was not the character of the obligations of the parties in the case under consideration.

---

**LIBEL — LIBELLING A JUDGE — BRIBERY — PLEADING.** — A recent case in the Supreme Court of Vermont<sup>7</sup> presents the novel spectacle of a judge of a Supreme Court "suing for his character," in the vernacular, or in more technical language, bringing an action for damages for libel charging him with receiving bribes, and other like corruption in office. As the trial was not upon the merits, the end is not yet, and we will look with much interest for the *denouement* of the story. The case was heard upon demurrer to the declaration, and presents some points of pleading which we regard as worthy of chronicle. The demurrer was overruled, the cause remanded, and defendants permitted to plead on the usual terms.

The (alleged) libel charged, in effect, that Judge Royce, being judge, chief judge, and chancellor of the State, was at the same time a partner in the law business of his son, who practiced in his court and was the attorney of a notable railroad corporation, and divided with him the fees earned by both, the son in bringing and defending the suits, the father in deciding them to the satisfaction of the client.

The court held that it is not necessary

<sup>2</sup> Bakeman v. Pooler, 15 Wend. 637; Thomas v. Evans, 10 East. 101; Douglas v. Patrick, 3 Tenn. 683.

<sup>3</sup> Bakeman v. Pooler, *supra*; Dickinson v. Shee, 4 Esp. N. P. 68; Brady v. Jones, 2 Dowl. & Ry. 305; Dunham v. Jackson, 6 Wend. 22.

<sup>4</sup> Jarvis v. Rogers, 13 Mass. 105; Hacock v. Franklin, etc. Co., 114 Mass. 155; Hathaway v. Fall River, etc. Bank, 131 Mass. 14.

<sup>5</sup> Cook v. Doggett, 2 Allen, 429; Talty v. Freedman's, etc. Bank, 93 U. S. 321; Smith v. Lewis, 26 Conn. 110; Adams v. Clark, 9 Cush. 215; Rawdon v. Johnson, 1 East, 203; Waterhouse v. Skinner, 2 Bos. & P. 447; Jackson v. Allaway, 1 Dowl. & Lowndes, 919; Boyd v. Lett, 1 C. B. 222.

<sup>6</sup> Smith v. Lewis, *supra*.

<sup>7</sup> Royce v. Maloney, S. C. Vt. July 15, 1886; 6 East. Rep. 459.

in a declaration stating a charge of receiving bribes, that the (alleged) briber should be described as a party to the record in the case in, and on account of which, the bribe is supposed and charged to have been given. It is sufficient if the briber had an interest in the case. The rule is general, that everything must be taken most strongly against the pleader, but it is not applicable to averments that are clear enough according to reasonable intendment and construction, though not worded with absolute precision. And Lord Ellenborough says:<sup>8</sup> "Where matter is capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in the sense in which the pleader must be understood to have used it, supposing him to have intended his pleading to be consistent with itself."

Upon this principle, and construing the words of the declaration, the court finds sufficient certainty in the allegations, that the railroad corporation has had "large interests involved in litigation in various suits pending in the said courts, in which this plaintiff has presided as judge, as aforesaid, in Franklin county aforesaid, and participated as judge of said Supreme Court as aforesaid." Thence it follows that the court might well apply the charge of bribery as relating to those suits so pending in the courts in which the plaintiff had so presided and participated.

A further objection to the declaration under consideration is, that no time is alleged when the railroad corporation had interests involved in litigation. The court says that such an allegation is probably a matter of form, and the want of it, helped by the statute of Anne, unless assigned as special cause of demurrer.<sup>9</sup> And in this connection the court further holds, that if several facts are stated in a continuous sentence, or in several sentences connected by the conjunction "and," and time is predicated of one of those facts, it will be applied to each and all of them.<sup>10</sup>

<sup>8</sup> Rex v. Stevens, 5 East, 244, 256.

<sup>9</sup> Higgins v. Highfield, 13 East, 407. See, also, Bowdell v. Parsons, 10 East, 359.

<sup>10</sup> Taylor v. Welsted, Cro. Jac. 443; 1 Chitty Pl. 258.

## INJUNCTION TO RESTRAIN A CREDITOR'S PROCEEDINGS IN A FOREIGN JURISDICTION.

- § 1. In Personam.
- § 2. English Chancery Court Foreclosing Mortgage in Foreign Jurisdiction.
- § 3. Comments of Lord Brougham.
- § 4. Same Continued.
- § 5. English Cases.
- § 6. Irish Courts.
- § 7. The Principles Relied upon by the English Courts.
- § 8. Massachusetts Cases.
- § 9. New York Cases.
- § 10. Georgia Cases.
- § 11. Other States.
- § 12. Conflict between Federal and State Courts.
- § 13. Garnishee Proceedings.
- § 14. Evading Exemption Laws.

In view of the close business relations existing between the citizens of different States of the Union, it often becomes a question whether a citizen of one State can be enjoined from proceeding against his fellow citizen in another State, or in a State to which they are both foreigners; and in all probability these questions will arise more frequently in the future than they have in the past.

§ 1. *In Personam*. — When granted, an injunction, operates *in personam*; — it simply prevents the person restrained doing a certain act, restrains his hand; and if he do the act prohibited, the court is usually powerless, and can only punish the one violating its decree by a contempt proceeding.<sup>1</sup> Courts also, acting upon the conscience of the person, often compel the defendant to perform a specified act concerning property situated outside of its jurisdiction; a notable instance of which, in the early history of this country, was the settlement of the dividing line between Pennsylvania and Maryland.<sup>2</sup>

§ 2. *English Chancery Court Foreclosing Mortgage in Foreign Jurisdictions*. — Proceeding upon the theory that the Court of Chancery could enforce obedience to its decrees when the person upon whom its hand was imposed was a resident of England, that court has foreclosed mortgages in the colonial possessions of that country, and enforced their payment. Thus a mortgage given upon land in the island of Sark was

<sup>1</sup> 3 Pom. Esq. Jur. § 1360.

<sup>2</sup> Penn. v. Baltimore, 1 Ves. L. 444.

foreclosed,<sup>3</sup> also in the West Indies,<sup>4</sup> and in other colonial possessions.<sup>5</sup> In these cases the court proceeded upon the theory that it was acting *in personam* and not *in rem*, that the right to redeem was a mere personal one and not an estate in the technical legal sense.<sup>6</sup>

§ 3. *Comments of Lord Brougham.*—The cases in the Court of Chancery, of its power to act upon matters outside of England, is well reviewed by Lord Brougham in *Portarlington v. Soulby*.<sup>7</sup> There the endorsee of a bill of exchange was enjoined from proceeding in the courts of Ireland. It was such a case that if the endorsee had proceeded in the English Courts he would have been enjoined, upon application, by the Court of Chancery. The bringing of the suit was regarded as contrary to good conscience. Lord Brougham used the following language: "Soon after the restoration, and when this, like every other branch of the court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors,—the Nottinghams and Macclesfields, the parents of equity—the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's reports, and somewhat more fully in Chancery cases, under the name of *Lowe v. Baker*.<sup>8</sup> In *Lowe v. Baker* it appears that only one of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction there, and the court allowed the subpoena to be served on him, and that this should be good service on the rest. So far, there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges. But the report adds: "*Led quaere*, for all the bar was of another opinion; and it is said that, when the argument against issuing it was used, that this court

had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever effects to bind, our orders being only pointed at the parties, to restrain them from proceeding. Accordingly this case of *Lowe v. Baker*, has not been recognized or followed in later times."

§ 4. *Same Continued.*—"Two instances are mentioned in Mr. Hargraves' collection, of the jurisdiction being recognized; and in the case of *Wharton v. May*.<sup>9</sup> In *Beauchamp v. Marquis of Huntley*,<sup>10</sup> which underwent so much discussion, part of the decree was to restrain the defendant from entering up any judgment, or carrying on any action in what is called the Court of Great Session in Scotland; meaning, of course, the Court of Session. I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of *Campbell v. Houlditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Sessions in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdictions of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the court. If the court can command him to bring home goods, from abroad, or to assign chattel interests, or to convey real property locally situated abroad; if, for instance, as in *Penn v. Lord*

<sup>3</sup> *Tellor v. Carteret*, 2 Vern. 449.

<sup>4</sup> *Archer v. Preston*, 1 Eq. Abr. 133; *Lord Arglasse v. Muschamp*, 1 Vern. 75, 135; *Lord Kildare v. Eustace*, 1 Vern. 75, 135, 419.

<sup>5</sup> *Paget v. Eade*, E. R. 18 Eq. 118. So in Connecticut a foreclosure of a mortgage on property partly in that and in an adjoining State was enforced. *Mead v. New York etc.*, R. R. Co. 45 Conn. 199.

<sup>6</sup> 2 Jones Mort. § 1444.

<sup>7</sup> 3 Myl. & K. 104.

<sup>8</sup> 2 Freeman, 125; S. C. 1 Ch. Cas. 67.

<sup>9</sup> Ves. 71; See also *Kennedy v. Earl of Cassillie*, 2 Swanst. 313; *Busby v. Munday*, 5 Madd. 297; *Harrison v. Gurney*, 2 J. & W. 563.

<sup>10</sup> Jac. 546.

Baltimore,<sup>11</sup> it can decree the performance of an agreement touching the boundary of a province in North America; or, as in *Teller v. Carteret*,<sup>12</sup> can foreclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner, it can restrain the party being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance, or other act, *in pais*, as the instituting, or prosecution of an action in a foreign court."

§ 5. *English Cases*.—We have already given an example wherein the defendant was restrained from further prosecuting his cause of action in a foreign jurisdiction by the English Court of Chancery. Several more are here added. Thus, a creditor who had availed himself of a decree in England to procure relief against the assets of an estate, was enjoined from proceeding with a suit against the same estate in an Irish Court.<sup>13</sup> So, where the parties had proceeded as far as the decree, and then proceedings were commenced in a foreign court, a stay was granted.<sup>14</sup> So, on a bill to redeem under a mortgage, where all the parties were within the jurisdiction of the court, it decreed an inquiry as to the amount due, and restrained proceedings for the foreclosure of the mortgage in a foreign court on terms.<sup>15</sup> So where a British creditor had fraudulently obtained a judgment in the British West Indies against his debtor, and on execution sold his debtor's real estate there, and became the purchaser under the decree, the sale was set aside by the court of Chancery for fraud. In this case all the interested persons were British subjects<sup>16</sup> So, a suit in England to enforce the execution of trusts of a deed for the benefit of creditors was instituted, and a receiver for real estates in England and Ireland was appointed; and then some of the trustees filed a bill in Ireland for executing the trusts of the same deed, upon petition to the Court of Chancery they were restrained.<sup>17</sup> So, where a bond for a

gaming debt was given in England and the obligee was proceeding in the Scottish courts to enforce the payment, and although he lived there, and owned real estate in Scotland, he was restrained by the English court; (1) because the English court knew the law applicable to the bond and the Scotch court could not know it except as a matter of evidence; (2) and because the remedy was more complete in England than in Scotland.<sup>18</sup> So an injunction was granted, in a suit to administer the trusts of a will, to restrain proceedings in the foreign court of Demerara for the recovery of real estate, where the Dutch law was in force, subjected by the testator to the trusts of the will; though the rights claimed in such foreign court were especially cognizant by the Dutch law.<sup>19</sup> So suit on a *post obit* bond in Scotland was restrained.<sup>20</sup> But where an incumbrance was placed upon immovable property situated in a foreign country, and the creditor instituted legal proceedings in that country for the purpose of enforcing his rights, the English court refused to restrain him from prosecuting such proceedings, even where the mortgagor was a company in the course of winding up its affairs. It is to be remarked, however, that the person applying for the injunction could appear, without any unusual expence or inconvenience, to the proceedings abroad and be fully protected in his rights.<sup>21</sup>

§ 6. *Irish Courts*.—So likewise the Irish courts assert and claim the same power as the English courts claim in this respect. Thus where a suit was instituted in the Irish Court of Chancery, and suit was also instituted in the English Court of Chancery concerning the same subject matter, the plaintiff in the English suit was enjoined in Ireland from further proceeding in the English court without permission of the Master of the Rolls there to be obtained upon notice to the plaintiff in the Irish suit.<sup>22</sup>

§ 7. *The Principles Relied upon by the English Courts*.—Of course the principles relied upon by the English Court of Chancery is to do equity between man and man; and that

<sup>11</sup> 1 Ves. Sen. 444.

<sup>12</sup> 2 Vern. 449.

<sup>13</sup> *Beauchamp v. Lord Huntley*, Jac. 546.

<sup>14</sup> *Wedderburn v. Wedderburn*, 4 Mylne & C. 585; s. c. 2 Beav. 208; *Graham v. Maxwell*, 1 Macn. & G. 71.

<sup>15</sup> *Beckford v. Kemble*, 1 Sim. & Ster. 7.

<sup>16</sup> *Cranstown v. Johnston*, 3 Ves. Jr. 170; s. c. 5 Ves. Jr. 276.

<sup>17</sup> *Harrison v. Gurney*, 2 Jac. & W. 563.

<sup>18</sup> *Busby v. Munday*, 5 Madd. 237.

<sup>19</sup> *Bunbury v. Bunbury*, 3 Jur. 644; affirming s. c. 1 Beav. 318.

<sup>20</sup> *Wharton v. May*, 5 Ves. 27, 71.

<sup>21</sup> *Moore v. Anglo-Italian Bank*, 10 Ch. Div. 681.

<sup>22</sup> *Parnell v. Parnell*, 7 Ir. Ch. 322.

it will not allow the subjects of its own country, within its jurisdiction, or a foreigner within its jurisdiction, to make use of the process of foreign courts to obtain an unjust advantage. As the Master of the Rolls once said; "I lay down the rule as broad as this; this Court will not permit him [the party sought to be restrained] to avail himself of the law of any other country to do, what would be gross injustice."<sup>23</sup> In another case<sup>24</sup> it was held that the Court of Chancery would restrain proceedings in a foreign court upon the same principles it would restrain a person proceeding in the courts of England. So in another case it was said; "There is no doubt whatever of the jurisdiction of this court acting upon the person to prevent the party proceeding in a foreign court. It is not disputed; nor can it be done; it is constantly done; not interfering with the foreign court any more than this court interferes with the court of Queen's Bench, but acting upon the person, and prohibiting them from doing that which, under the circumstances, the court thinks they ought not to do."<sup>25</sup> If the matter can be more conveniently litigated in the foreign court, however, the injunction will be refused;<sup>26</sup> but if the suit abroad seems ill calculated to answer the ends of justice, the action will be restrained on reasonable terms.<sup>27</sup> And if litigation is pending in England where complete relief can be had, and a party then institutes proceedings abroad, the Court of Chancery considers that act as a vexatious harassing of the opposite party and will restrain his proceeding in the foreign court.<sup>28</sup> In one case it was said; "If circumstances are such as would make it the duty of the court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of the court so to act, if from any course it appears likely to be more conducive to substantial justice that the

foreign proceedings should be left to take their course."<sup>29</sup>

§ 8. *Massachusetts Courts.*—In Massachusetts, the doctrine of the English Court of Chancery is fully recognized. In a case before the Supreme Court it was sought to restrain a creditor residing there from proceeding against a resident debtor in the courts of Pennsylvania, in garnishment, on the ground that the creditor knew when he instituted the foreign suit that insolvent proceedings were about to be instituted against the debtor at his home. The object of the creditor in suing abroad was to obtain a preference. The case received much attention, and it was said that the "authority of this [the Supreme] court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State or of other States or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly prevented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction *ad amenable* to process, to restrain them from doing acts which will work wrong and injury to others and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court in this State, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court."<sup>30</sup> All that is necessary to sustain the jurisdiction in such cases

<sup>23</sup> *Cranstown v. Johnston*, 3 Ves. 170; s. c. Ves. 276; *S. P. Jackson v. Petrie*, 10 Ves. 164.

<sup>24</sup> *Lord Partarlington v. Soulby*, 3 Mylne & K. 104.

<sup>25</sup> *Bunbury v. Bunbury*, 3 Jur. 644.

<sup>26</sup> *Jones v. Geddes*, 1 Ph. 724; *Elliot v. Lord Minto*, *Madd. & Gel.* 16; *Kennedy v. Cassillie*, 3 Swanst 313.

<sup>27</sup> *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 478.

<sup>28</sup> *Id.*; See *Harrison v. Gurney*, 2 Jac. & W. 563; and *Beckford v. Kemble*, 1 Sim. & S. 7.

<sup>29</sup> *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416.

<sup>30</sup> 2 Story on Eq. Secs. 899, 890; *Mackintosh v. Ogilvie*, 3 Swanst. 365 n. 4 T. R. 197 n.; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 445; *Maclaren v. Stainton*, 1b Beav. 286; *Massie v. Watts*, 6 Cranch. 158; *Briggs v. French*, 1 Sumn. 604; *Dobson v. Pearce*, 4 Duer. 142; s. c. 2 Kern. 156.

is, that the plaintiff should show a clear equity, and that the defendants should be subject to the authority and within the reach of the process of the court."<sup>31</sup>

§ 9. *New York Courts.*—The courts of New York recognize the power of a court of equity to restrain persons within their jurisdiction from proceeding, abroad, to enforce their claims, but require an extreme case to be presented before they will exercise it; and they also state that a violation of such an order would amount to a contempt.<sup>32</sup> The general rule is that the courts will not interfere.<sup>33</sup> But where the defendant was proceeding abroad before an American consul, who had no jurisdiction of the action, prosecuting a case, the court stayed the plaintiff's hand.<sup>34</sup> So to prevent injustice and oppression the courts of that State grant relief. Thus where the defendant in an action brought in New York by his wife for a limited divorce, commenced an action in Connecticut against her for a separation and a decree relieving him from the obligation of supporting her, intending to bring it to trial in that State before his wife could obtain a trial in New York; and all the wife's witnesses resided in New Jersey, and she was pecuniarily unable to defend the action brought by her husband in Connecticut, an injunction was granted at her request to stay the husband's further prosecuting the Connecticut action.<sup>35</sup> So where the plaintiffs had been burned out in Chicago's great fire, had thereby become indebted one million dollars, and had settled with their creditors at twenty five cents on the dollar; and afterwards, one of their creditors brought an action in Illinois, though resident in New York, as were also the debtors, alleging that the debtor plaintiffs had settled with some of their cred-

itors at more than twenty-five cents on the dollar, and it appeared that the suit was commenced for blackmailing purposes and to ruin the credit of the plaintiffs, a restraining order was granted to prevent the defendants prosecuting their Illinois suit.<sup>36</sup> So where New York parties proceeded against parties of the same State in Vermont, and it appeared that the suit would greatly injure the parties proceeded against, and that they could not in Vermont fully set up their defence, the parties plaintiff in Vermont were restrained in their foreign proceedings.<sup>37</sup>

§ 10. *Georgia Cases.*—In Georgia the right to enjoin persons from proceeding in foreign courts is recognized. Thus where a creditor sued his debtor both in that State and in New York on the same claim and first obtained judgment in Georgia which was paid off, and fraudulently led his debtor to believe that the New York case would not be pressed to judgment, but it was in fact so done, the Georgia court restrained the creditor from further proceeding on the New York judgment. Both parties were residents of Georgia.<sup>38</sup> So where attorneys of that State were enjoined from proceeding in the Federal Court, and afterwards commenced a suit therein, they were punished for contempt of the State Court. They brought the suit on behalf of their foreign creditors.<sup>39</sup>

§ 11. *Other States.*—In Vermont while the general powers of the courts in this respect is fully acknowledged, yet it is said that it will not be exercised unless there exists some peculiarly equitable ground for so doing, and the mere preference of the plaintiff to have the matter determined in his own State courts is not sufficient; and if the court cannot enforce its decree, it will refuse to intercede. Such a case arises where the defendant resides in the State where he has commenced proceedings, although service has been had upon him while transiently in Vermont, and he has no property within the State for a writ of sequestration to operate upon in case a decree re-

<sup>31</sup> Dehan v. Foster, 4 Allen 545. The case afterwards came up and the defendants were allowed their costs in the foreign court up to the time of filing the bill for injunction in Massachusetts, but not after that time. *s. c.* Dehan v. Foster, 7 Allen, 57. For additional English cases, see *In re Boyse*, L. R. 15 Ch. D. 591; *Hope v. Carnegie*, L. R. 1 Ch. 320; *In re Chapman*, L. R. 15 Eq. 75; *Ostell v. LePage*, 2 De G. M. & G. 892.

<sup>2</sup> Erie R. W. Co. v. Ramsey, 45 N. Y. 637, 648.

<sup>3</sup> Williams v. Ayroult, 31 Barb. 364; Mead v. Meritt, 2 Paige Ch. 402; Burgess v. Smith, 2 Barb. Ch. 276; Bicknell v. Field, 8 Paige, 140.

<sup>4</sup> Dainese v. Allen, 3 Abb. Pr. (N. S.) 212.

Kittle v. Kittle, 8 Daly, 72.

<sup>36</sup> Claflin & Co v. Hamlin, 62 How. Pr. 284.

<sup>37</sup> Vail v. Knapp, 49 Barb. 299. See Hays v. Wood, 4 Johns. Ch. 123.

<sup>38</sup> Engel v. Scheuerman, 40 Geo. 206; *s. c.* 2 Amer. Rep. 573; See Lightfoot v. Planter's Banking Co., 58 Geo. 136.

<sup>39</sup> Hines & Hobbs v. Rawson, 40 Geo. 356; *s. c.*, 2 Amer. Rep. 581.

straining him be entered, and he refuse to obey it.<sup>40</sup> In Illinois where it was sought to restrain several parties from proceeding in Colorado, but all of them were not before the court, and all were necessary parties, relief was refused; and it was added that after suits were commenced in one of the States their prosecution would not be controlled by the courts of another State.<sup>41</sup> In this, however, the court, so far as the last statement is concerned, is clearly in error, if it is thereby meant that the courts of another State have no power to control the parties when within their jurisdiction so far as to forbid them prosecuting their cause of action abroad. But where the plaintiff and defendant were partners, and the defendant, by proceedings in the courts of another State obtained a dissolution of the partnership, in which proceedings it was stipulated that the plaintiff might carry on the business under the direction of a receiver, with the right to all products manufactured in business, the court restrained the defendants from unlawfully interfering by replevin suits with the sale of such manufactured products.<sup>42</sup> So in New Hampshire the court said, speaking of the power to grant relief in a proper case, "we have no hesitation in holding that the court has jurisdiction;"<sup>43</sup> but if the judgment taken in another State is merely erroneous, and relief can be obtained by appeal; if the case is such that the court, where applied to, would not enjoin its enforcement if a domestic judgment, relief will be denied.<sup>44</sup> So in Michigan relief was refused generally, on the ground that if courts of one State should see fit to enjoin proceedings in another, that other might retaliate in like by enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction.<sup>45</sup> But the reasoning loses its force when we recollect that such proceedings only proceed *in perso-*

*nam* and do not in any way touch the proceedings of the foreign court.

§ 12. *Conflict between Federal and State Courts.*—It is very clear that a State court cannot in any way interfere with proceedings in a Federal court,<sup>46</sup> but will let the party seeking relief apply in that court.<sup>47</sup> Nor will the Federal courts interfere with proceedings in a State court.<sup>48</sup> But there is no reason why the State courts, acting *in personam*, may not restrain a party from proceeding in a Federal court; and the same is true of the Federal courts.<sup>49</sup> The fact that the State courts have decided that a certain class of securities are void is not sufficient to restrain a creditor holding one of those not passed upon, of the same series, from resorting to the Federal courts to enforce it,<sup>50</sup> where they are held valid.

§ 13. *Garnishee Proceedings.*—As we have already seen, the Massachusetts' court enjoined one of its own citizens from proceeding in a foreign court to garnishee a debt owed to a resident of Massachusetts.<sup>51</sup> The object of the Massachusetts' creditor was, to obtain a preference over other creditors and thus avoid the effect of contemplated insolvency proceedings. This case is strongly supported by the opinion of Lord Hardwicke in *Mackintosh v. Ogilvie*.<sup>52</sup> In that case the plaintiff was an assignee in bankruptcy; the defendant, a creditor, who, before the bankruptcy, went into Scotland and made "arrestments" of debt due to the bankrupt from persons resident there. Lord Hardwicke, in giving judgment, said it was "like a foreign attachment, by which this court will not suffer a creditor to gain a priority." An injunction was granted upon the ground that it was against equity for a creditor to evade the laws of his own country, and thereby obtain a preference to the injury of the other creditors.

<sup>40</sup> *Bank v. Portland, etc. R. R. Co.* 28 Vt. 470; See *Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co.*, 46 Vt. 792.

<sup>41</sup> *Harris v. Pullman*, 84 Ill. 20; s. c. 25 Amer. Rep. 416.

<sup>42</sup> *Pindell v. Quinn*, 7 Ill. App. 655; *Great Falls etc. v. Worster*, 23 N. H. 470.

<sup>43</sup> *Metcalf v. Gilmore*, 59 N. H. 417; s. c. 47 Amer. Rep. 217.

<sup>44</sup> *Id.*

<sup>45</sup> *Carroll v. Farmer's & Merchant's Bank, Harr. (Mich.)* 197. This reasoning has been elsewhere used. See *Mead v. Merritt*, 2 Paige Ch. 402.

<sup>46</sup> *McKinn v. Voorhees*, 7 Cranch. 279; *Riggs v. Johnson Co.*, 6 Wall. 166; *U. S. v. Keokuk*, 6 Wall. 514; *Town of Thompson v. Norris*, 63 How. Pr. 418; s. c. 11 Abb. N. Cas. 163.

<sup>47</sup> *Coster v. Griswold*, 4 Ed. Ch. 364; *Schuyler v. Peltisser*, 3 Ed. Ch. 203.

<sup>48</sup> *Rogers v. Cincinnati*, 5 McLean 337.

<sup>49</sup> *Hines & Hobbs v. Rawson*, 40 Geo. 356; s. c. 2 Amer. Rep. 581.

<sup>50</sup> *Town of Venice v. Woodruff*, 62 N. Y. 462.

<sup>51</sup> *Dehon v. Foster*, 4 Allen 545.

<sup>52</sup> 4 T. R. 193 n, s. c. 3 Swanst. 365 n.

§ 14. *Evading Exemption Laws.*—It is no unusual thing for a creditor or inhabitant of a State, when he cannot collect his claim off his debtor who is a resident of the same State, because he takes refuge under the exemption laws of that State, to send his claim into another State and garnishee a debt due to his debtor. This is particularly the case where the debtor is working for a corporation having officers in several States, as a railroad corporation. Unless protected by an injunction, the debtor is at the mercy of his creditor.<sup>53</sup> This is particularly the case in Indiana, where great trunk lines run across the State, extending into States on both sides of it. To such an extent was it practiced that the Legislature made it a fineable offense to go into a foreign jurisdiction to garnishee the debtor's wages, or to sell or transfer it with that object in view.<sup>54</sup> But where a claim against a railroad employee was transferred to a citizen of Kentucky, and the wages of the employer were garnished in that State, and thereby he was deprived of his wages, exempt from attachment in Indiana, it was held that the debtor could not successfully sue the original holder of the claim because of his having made the assignment contrary to the statute, and thus hold him liable in damages for having deprived the debtor of his right of exemption.<sup>55</sup> But the Courts of Ohio in such a case, before the garnishee proceedings are finally decided (not afterward<sup>56</sup>) will restrain the creditor, if within its jurisdiction, from proceeding in the foreign courts, and thus preserve for the debtor his property exempt by law in that State from seizure to pay the debt.<sup>57</sup> Yet the Supreme Court of Kansas has refused an injunction in such a case, and will not restrain the action solely on the ground, that the property attached is exempt;<sup>58</sup> while a judge of one of the Superior Courts of that State has evidently been of a different opinion and sustained

the application for an injunction.<sup>59</sup> In Maryland a creditor sent his claim to West Virginia and garnished his debtor's wages, which were exempt from garnishment in Maryland, where the debtor resided. The lower court refused an injunction to restrain the creditor's farther prosecuting his claim in West Virginia; but on appeal the decision was reversed and the power of the court to grant relief was held to be ample, and such a case made as called for its immediate exercise.<sup>60</sup> W. W. THORNTON.

Crawfordsville, Ind.

<sup>53</sup> *Wilkinson v. Colter*, 2 Kan. L. J. 202; See 21 Cent. L. J. 521. I have only a notice of this case. See *Missouri Pacific, etc. Co. v. Maltby*, 23 Cent. L. J. 154.

<sup>60</sup> *Keyser v. Rice*, 47 Md. 203; s. c. 28 Amer. Rep. 448.

#### ASSIGNMENT—INSOLVENCY—EQUITY— INJUNCTION—COMITY.

CUNNINGHAM v. BUTLER.\*

*Supreme Judicial Court of Massachusetts, May 11, 1886.*

*Assignment—Insolvency—Injunction to Restrain Creditor from Securing Assets in Foreign State.*—This court has jurisdiction in equity to enjoin a citizen of this Commonwealth from prosecuting an attachment of personal property in another State, belonging to an insolvent debtor of this Commonwealth, which would prevent the same from coming to the hands of the assignee in insolvency. The fact that the action was commenced before the institution of proceedings in insolvency makes no difference, providing it was done with a knowledge that such proceedings were about to be instituted, and with a view of obtaining a preference.

Bill in equity by the assignee in insolvency of Daniel C. Bird of Brockton for an injunction to restrain the defendants from prosecuting a suit against Bird in New York. The case was reserved by a single justice upon agreed facts for the consideration of the full court. The facts appear in the opinion.

*E. M. Johnson and M. R. Thomas, for plaintiffs. M. F. Dickinson, Jr., and H. R. Bailey, for defendants.*

DEVENS, J., delivered the opinion of the court. The case, as disclosed by the facts agreed and by the additional evidence submitted, is substantially as follows: Daniel C. Bird, a citizen and resident of Massachusetts, was in embarrassed circumstances and indebted to the defendants, also citizens and residents of Massachusetts. After

<sup>53</sup> The Ohio statute of Exemption of monthly wages is broad enough to cover the wages of a non-resident when sought to be garnished in that State.

<sup>54</sup> R. S. 1881 Sec. 2163.

<sup>55</sup> *Uppinghouse v. Mundel*, 2 N. E. Rep. 719, 103 Ind. 238.

<sup>56</sup> *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 347; See *Morgan v. Neville*, 74 Pa. St. 53.

<sup>57</sup> *Snook v. Snetzer*, 25 Ohio St. 516. See also answer to query, 6 Cent. L. J. 258.

<sup>58</sup> *Cole v. Young*, 24 Kan. 435.

\*S. C., 5 Eastern Reporter, 725.

the suspension of payment by Bird, the defendants were informed by him, on the night of March 4 and 5, 1885, that a balance was due him from Aaron Claflin & Co., of New York. On March sixth, the defendants executed an assignment to Fayerweather, a resident of New York, of their claims against Bird, which assignment was made without consideration and without previous communication. On March 11 and 25, 1885, two actions were commenced in New York, in the name Fayerweather, on these claims against Bird as defendant, Claflin & Co. being summoned as garnishees. Between March thirteenth and May twentieth, there was various meeting of Bird's creditors, and a proposition on his part for a composition under the statute was filed by Bird, returnable May fourth. Stat of 1884, chap. 236. On May 20, 1885, this proposal was withdrawn; regular proceedings in insolvency were continued therein and, on June 1, 1885, the plaintiffs were duly appointed assignees of Bird in insolvency.

No judgment had at this time, nor had it at the commencement of this proceeding—or, so far as appears, has it since—been obtained in New York on the claims sued by Fayerweather. Without stating in detail the evidence, it is fairly proved that the defendants, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, of the avails of the debt owing to Bird by Claflin & Co., made the transfer of their claims to Fayerweather, and that the suits in New York, now carried on his name are subject to their control and conducted for their benefit. The attachment made in New York, by process of garnishment, are to be treated, so far as the defendants are concerned, as made by them.

In *Dehon v. Foster*, 4 Allen, 545, it was held that this court has jurisdiction in equity upon a proper case made to enjoin a citizen of this Commonwealth from availing himself of an attachment of personal property in another State, in an action against a debtor, who is insolvent under the laws of the Commonwealth, and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with a knowledge that such proceedings were about to be instituted and with a view to obtain a preference. In the same case, 7 Allen, 57, it was held that the equitable right of the trustee was paramount, unless some valid claim or lien existed on the funds which, under the laws of the foreign State, would divert them from the assignees, if the defendants were compelled to abandon their attachment of them in the courts of that State.

If it be held that the facts in the case at bar as we find them to be, the argument of the defendants is principally directed to showing that the case of *Dehon v. Foster* was erroneously decided,

and that it should now be reconsidered and overruled. They contend that the provision of the Constitution of the United States, article 4 §§ 1 and 2, which enacts that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," was not therein sufficiently considered, and that, as the attachment proceedings in New York, in the case at bar, are judicial proceedings by a court of competent jurisdiction, the plaintiffs are not entitled to relief, as the courts in that State are entitled to decide to whom the property found therein belongs.

They especially rely upon the cases of *Green v. Van Buskirk*, 5 Wall. 308; 7 id. 140; *Warner v. Jaffray*, 96 N. Y. 248; and *Lawrence v. Batcheller*, 131 Mass. 506, all of which have been decided since *Dehon v. Foster*. The case of *Green v. Van Buskirk* may be briefly stated as follows: A., B. and C. were residents and citizens of New York. A., being indebted to both B. and C., mortgaged certain personal chattels then in Illinois to B. Before the mortgage could be recorded in Illinois, or the property delivered there, one of which acts is essential by the laws of Illinois to the validity of the mortgage, as against third parties, although not by the laws of New York, C. took an attachment out from one of the courts of Illinois, a proceeding *in rem*, and under the laws of that State, in due form levied on and sold the property. B. did not make himself a party to this suit in attachment, although he had notice of it, and by the law of Illinois, a right to make defense to it, but after termination, brought suit in New York against C. for taking and converting the chattels; C. pleaded in bar the proceedings in attachment and the judgment obtained in Illinois. It was held in the Supreme Court of the United States, reversing the decision of the Supreme Court of New York, that in order that "the full faith and credit" required by the constitution should be given to the judicial proceedings in the State of Illinois, the judgment of the court there, that the personal property there situate, was subject to this process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from A. was binding elsewhere; that is, as the effect of the attachment, judgment, levy and sale was to protect B. if sued in Illinois for the property thus acquired, it would protect him when sued in the court of another State for the same transaction, if he justified in the same manner; that the fiction of law, that the domicile of the owner draws to it his personal estate, yields, whenever, for the purposes of justice, the actual situs of property should be examined; that a title acquired under the attachment laws of a State and held valid there would be held valid in any other State, even if all parties interested in the controversy were citizens of such other State; and thus as an attachment of personal property in Illinois would take precedence of an unrecorded mortgage, exe-

cuted in another State, where record was necessary, it would do so, though the owner of the chattels, the attaching creditor and the mortgage creditor were all residents of such other State. But the case of *Dehon v. Foster* recognizes the law to be as held by the Supreme Court of the United States in *Green v. Van Buskirk*. "The case," says Chief Judge Bigelow, "proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien, which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania." Holding this to be the law, it is decided that the act of the defendants, in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tends directly to defeat the operation of the insolvent law in its most essential features, to prevent a portion of the property of the debtors from coming to the assignees, to be equally distributed among their creditors, and to obtain a preference for themselves; that the defendants, being citizens of this State, are bound by its laws and cannot be permitted to do any acts to evade or counteract their operations the effect of which is to deprive other citizens of rights which those laws were intended to secure.

The case of *Lawrence v. Batcheller*, *ubi supra*, clearly recognizes the ground above stated as that upon which *Dehon v. Foster* proceeds, and in no way controverts it. That was a case in which the attaching creditor, who was a resident in this State, had proceeded to judgment in a foreign State, after proceedings in insolvency in this, and had actually collected the amount from funds in the hands of a trustee of the debtor, by virtue of attachment. He was here sued for the amount he had thus collected by the assignee in insolvency. It was there said, referring to the case of *Dehon v. Foster*, "because it was beyond the power of the court to call in question the validity of this lien, acquired under the laws of another State, it proceeded to enjoin the defendants, over whom the court had jurisdiction, from enforcing in another State their legal rights." It was further held that the defendant, having been permitted without interference to proceed to judgment, an action at law for the value of the property obtained would not lie against him by the assignee, as there were many rights in equity which courts of law did not recognize at all, for which reason defendants in equity were often enjoined from prosecuting actions at law.

The case of *Warner v. Jaffray*, 96 N. Y. 248, was as follows: A general assignment for the benefit of the creditors had been made, under the general assignment of New York—Laws of 1877—on March 1, 1881. It was not recorded in Pennsylvania until March 18, where it could only become operative by record, so as to affect any *bona fide* purchaser, creditor, etc. Previous to the eighteenth, the defendant had brought suit in Pennsylvania and attached property there. He

was himself a citizen of New York, as was the debtor and his assignee. It was held in a proceeding brought against the creditor in New York, that the lien he had acquired in Pennsylvania was saved from the operation of the assignment; that he had the same right to enforce payment of his claim out of the debtors property that a resident creditor in Pennsylvania had, and that he would not, by any order, be restrained from pursuing it. But in *Warner v. Jaffray*, the assignment was of an entirely different nature from that made in proceedings in insolvency such as is found in the case at bar. The property of the debtor was not taken for distribution by the law, but by his own voluntary act. The assignment did not operate on the claim of the debtor, or place them under any obligation to join into it. They were entirely free to act, could refuse to have any thing to do with it, could retain their claims and enforce them afterward against the debtor, or immediately against any property not covered by the assignment. The assignee was a trustee only to the extent that the creditors chose to accept him as such. As he violated no rights of other creditors, in pursuing any property not covered by the assignment, and was bound in no way thereby, he could not properly have been restrained from seeking his remedy wherever there was attachable property which the assignment did not reach.

The cases relied on by the defendants cannot, therefore, be deemed to diminish the authority of *Dehon v. Foster*. Nor can we see that there is injustice in holding that in a State, which has enacted a system for an equal distribution of the assets of an insolvent among his creditors, residents of that State, who are bound by the decree establishing the insolvency, should be restrained from seeking, in other States, assets which otherwise might reasonably be expected to come to his assignee.

While the claims of the residents of another State to property there situate might not be set aside or compelled to yield in such State to those of such assignee, yet it could properly be held that, where the pursuing creditors were not citizens of the State whose process was invoked, the courts thereof would not sustain their claim in preference to that of an assignee, obtaining title under the laws of another State, certainly if such title was previously acquired. *Burlock v. Taylor*, 16 Pick. 335; *Bentley v. Whittemore*, 4 C. E. Green, 462, *Sanderson v. Bradford*, 10 N. H. 265.

It has been decided in Pennsylvania that while claims of a receiver of a corporation, appointed by the courts of another State to property there situate, could not be recognized when they came in conflict with those of residents of Pennsylvania; yet that, where a receiver of a corporation had been appointed by a court of competent jurisdiction in another State, a creditor who resides in that State, and is bound by the decree of the court appointing this receiver, cannot, in an attachment execution, recover assets of the corpor-

Vo  
atio  
tic.  
In  
had  
ther  
sig  
cut  
on t  
and  
inte  
as t  
den  
exte  
and  
tors  
the  
pro  
a su  
wor  
Stat  
In  
No  
enjo  
insti  
ing  
is no  
Th  
the  
ceed  
clisio  
"I  
upon  
in th  
grou  
der  
the  
not  
with  
of d  
part  
equi  
pers  
In  
that  
juris  
ever  
the  
decr  
1 M  
John  
193;  
Bun  
7; H  
Y. &  
2 S  
man  
Hol  
(N. C  
Allen  
Vt. 4  
v. O  
Keys  
3 F  
2 Ver  
Ld B  
M. &  
46  
H. 46

ation which the receiver claims. *Bagby v. Atlantic, M. & O. R. R. Co.*, 86 Penn. St. 291.

In the case at bar it is true that the defendants had made their attachment, through Fayerweather in New York, before there had been an assignment in insolvency in this State actually executed; but this was done with the full knowledge on their part that the debtor Bird was embarrassed and had suspended payment, and necessarily with intent to avoid the effect of the agreement, so far as the property attached was concerned. As residents of this State, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court and amenable to its process, and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the State.

Injunction accordingly.

NOTE.—The general power of courts of equity to enjoin parties, resident within their jurisdictions, from instituting suits in foreign courts or further prosecuting suits already commenced, while formerly doubted, is now firmly established in England.<sup>1</sup>

The weight of authority in America seems to favor the English doctrine, particularly as applied to proceedings in the courts of sister States, though the decisions of the various courts are not uniform.<sup>2</sup>

"In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person upon whom the restraining order is made resides within the jurisdiction, and is in the power of the court issuing it. \* \* \* They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of dispute, they consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees *in personam*."<sup>3</sup>

In *Massie v. Watts*, it was said by Marshall, C. J., that "In a case of fraud, or trust, or of contract, the jurisdiction of a court of equity is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."<sup>4</sup>

<sup>1</sup> McLaren v. Stainton, 16 Beav. 279; Cranston v. Johnson, 3 Vesey Jr. 183; Mackintosh v. Ogilvie, 4 T. R. 193; Bushley v. Munday, 5 Madd. R. 297; Bunbury v. Bunbury, 3 Jur. 618; Beckford v. Kemble, 1 Sim. & Sta. 7; Harrison v. Gurney, 2 Jac. & W. 563; Bowler v. Orr, 1 Y. & C. 464; Portarlington v. Soulbey, 3 Myl. & K. 104.

<sup>2</sup> Snook v. Snetzer, 25 Ohio St. 516; Engel v. Scheuerman, 40 Ga. 206; Vail v. Knapp, 49 Barb. 299; Field v. Holbrook, 3 Abb. Pr. R. 377; Thompson v. Norris, 11 Abb. (N. C.) 163; s. c., 63 How. Pr. R. 424; Dehon v. Foster, 4 Allen, 544; Id., 7 Allen, 57; Bank v. R. & B. Rd. Co., 38 Vt. 470; V. & C. Rd. Co. v. V. C. Rd. Co., 46 Vt. 792; Pearce v. Olney, 20 Conn. 543; Hays v. Ward, 4 Johns. Ch. 123; Keyser v. Rice, 47 Md. 203.

<sup>3</sup> Foster v. Vassall, 3 Atkyns R. 589; Toller v. Carteret, 2 Vern. 494; Snook v. Snetzer, 25 Ohio St. 516; Penn v. Ld Baltimore, 1 Ves. Sr. 444; Portarlington v. Soulbey, 2 M. & R. 104.

<sup>4</sup> 6 Cranch, 148; Great Falls Mfg. Co. v. Worster, 23 N. H. 402.

Probably few courts would refuse to enjoin a threatened suit in a foreign court, or the prosecution of a suit already begun in a foreign court in a case where the domestic court had previously acquired jurisdiction of the same cause, and was in a position to do justice between the parties, and the parties were amenable to its process.<sup>5</sup>

Where the foreign suit has been commenced prior to the seeking of the injunction or prior to the commencement of the action in aid of which the injunction is sought, the courts are not agreed as to whether the injunction should issue. It is fairly well settled, that the federal courts will not enjoin proceedings in a State court, whose jurisdiction has first attached, except in aid of bankruptcy proceedings, and that State courts will not enjoin parties from prosecuting a suit already instituted in a federal court.<sup>6</sup>

In *Peck v. Jenness* the court says: "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether the decision be correct or otherwise, its judgment till reversed is regarded as binding in every other court; and that where a jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away, by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction and the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. \* \* \* The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."<sup>7</sup>

Some State courts apply the same rule to suits in the courts of sister States;<sup>8</sup> while others entertain the contrary doctrine.<sup>9</sup>

Those courts which grant injunctions in cases where the jurisdiction of the foreign court has first attached, do so only when injustice is threatened,<sup>10</sup> or the exemption laws of the domestic jurisdiction are sought to be evaded,<sup>11</sup> or the domestic court can do more complete justice between the parties,<sup>12</sup> or other special circumstances demand it;<sup>13</sup> and where the foreign court, within whose jurisdiction the property in controversy is situated, is in a position to settle the equities between the parties, the injunction should be refused.<sup>14</sup>

<sup>5</sup> French v. Hay, 22 Wal. 250; Fisk v. N. P. Ry. Co., 10 Blatchf. 518; High on Inj., § 110.

<sup>6</sup> Orton v. Smith, 18 How. (U. S.) 263; Diggs v. Walcott, 4 Cranch, 179; Campbell's Case, 1 Abb. (U. S.) 185; Rogers v. Cincinnati, 5 McLean, 337; Bank v. Skelton, 2 Blatchf. 14; Carroll v. Bank, Harring. (Mich.) 197; Schuyler v. Pelissier, 3 Edw. Ch. 191; Carter v. Griswold, 4 Id. 364; Chaffin v. St. Louis, 4 Dill. 19; Moore v. Holliday, 4 Dill. 52.

<sup>7</sup> 77 How. (U. S.) 612.

<sup>8</sup> Carroll v. Bank, Harring. (Mich.) 197; Harris v. Pullman, 84 Ill. 20; Mead v. Merritt, 2 Paige, 402; Bicknell v. Field, 8 Id. 440; Williams v. Aysault, 31 Barb. 364.

<sup>9</sup> Snook v. Snetzer, 25 Ohio St. 516; Engel v. Scheuerman, 40 Ga. 206; Dehon v. Foster, 4 Allen, 544; Pearce v. Olney, 20 Conn. 543.

<sup>10</sup> Engel v. Scheuerman, 40 Ga. 206; Pearce v. Olney, 20 Conn. 543; Cranston v. Johnson, 3 Vesey Jr. 183.

<sup>11</sup> Snook v. Snetzer, *supra*; Keyser v. Rice, 47 Md. 203.

<sup>12</sup> Bushley v. Munday, 5 Madd. R. 297.

<sup>13</sup> Vail v. Knapp, 49 Barb. 299; Thompson v. Morris, 11 Abb. (N. C.) 163.

<sup>14</sup> Harris v. Pullman, 84 Ill. 20; Kennedy v. Cassells, 3 Swainston, 313; Jones v. Gedder, 1 Ph. 724; McLaren v.

That the judgment of the foreign court will probably be different from that which a domestic court might be expected to render is not, of itself, ground for injunction.<sup>15</sup>

Again, the injunction should not be allowed unless the parties are within the court's jurisdiction, or, at least, have property within such jurisdiction subject to sequestration.<sup>16</sup>

In the cases examined, where injunctions have been allowed to restrain attachment proceedings in foreign courts, instituted in contemplation of assignments for the benefit of creditors, the injunctions have issued to prevent creditors from obtaining unjust preferences;<sup>17</sup> whether a party to a foreign attachment will be enjoined when the assignment contains preferences valid by the laws of the State where made, *quære*.

CHAS. A. ROBBINS,

Lincoln, Neb.

Stainton, 35 Eng. L. & Eq. 384; *Moor v. Anglo-Italian Bank*, 2 Ch. D. 681.

<sup>15</sup> *Bank v. R. & B. Rd. Co.*, 28 Vt. 470.

<sup>16</sup> *Bank v. R. & B. Rd. Co.*, *supra*.

<sup>17</sup> *Dehon v. Foster*, 4 Allen, 544; *Mackintosh v. Ogilvie*, 4 T. R. 193.

#### CHARITIES—CHARITABLE USES—TRUST—WHAT CONSTITUTES—LEGACY—WHEN VOID FOR UNCERTAINTY—PRECATORY WORDS.

MAUGHT v. GETZENDANNER.\*

*Court of Appeals, Maryland, June 24, 1886.*

*Charities and Charitable Uses—Trust Void for Uncertainty.*—A clause in a will bequeathing property to a person, "to use and appropriate for religious and charitable purposes and objects in such sums and in such manners as will, in his judgment, best promote the cause of Christ," creates a trust, but is void for uncertainty.

Appeal from circuit court, Frederick county. In equity.

C. V. S. Levy and M. G. Urner, for appellants; Wm. T. Mauley, Jr., and J. E. R. Wood, for appellees.

MILLER, J., delivered the opinion of the court:

The decree *pro forma*, from which this appeal is taken, annuls the residuary clause in the will of George Richards. In this will, the testator, after giving a large number of pecuniary legacies to his relatives and next of kin, gives the sum of \$10 to the Reverend H. G. Bowers, and, immediately following this last legacy, is the clause in question, which reads as follows:

"I give and bequeath and devise unto the Reverend H. G. Bowers, of Jefferson, Maryland, all the rest and residue of my estate, and desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner, as will, in his judgment, best promote the cause of Christ."

\*S. C., 5 Atlantic Reporter, 471.

The controversy is between the heirs at law and next of kin of the testator on the one side, and the Reverend Mr. Bowers on the other. The former contend that a trust was created by this clause of the will, and that such a trust is void, and therefore the property descends to them; while the latter insists that no trust is created, and that such a trust is void, and therefore the property descends to them; while the latter insists that no trust is created, and that he takes the property in his own right, or, if there be a trust, that it is valid and effective.

If there had been no decisions of the courts upon the subject, and this possession could be carried out in accordance with the intention of the testator, there would be very little difficulty in the case. He did not mean that this property should go to his heirs at law and next of kin; for, if he did, he would not have inserted this clause in his will. Neither did he intend that Mr. Bowers, a stranger to him in blood, should take the property for his own individual benefit. He gave him a legacy of \$10, and this is manifestly all the personal benefit he intended to bestow upon him. His intention undoubtedly was that this residue of his estate should be devoted to the "cause of Christ," and, in order to carry this into effect, he selected his friend, the Reverend Mr. Bowers, as his disbursing agent or trustee. He gives to this agent, the discretion to select the religious and charitable purposes upon which his bounty was to be bestowed, and the amount to be allotted to each, but gives him no discretion so to distribute it or not, as he pleased. He says to him, in effect: "I give you this property, not for your own benefit, but to use and appropriate it to the cause of Christ, leaving it to you to select what religious and charitable purposes and objects shall be the recipients of my bounty, as well as the sums which each shall receive, and you must make such selection and distribution among the objects selected as will, in your judgment, best promote that cause." This, as it appears to us, was the plain intention of the testator, and is the plain meaning of this clause. It is true, he does not use the term "in trust," but the language, "and I desire him to use and appropriate" the same for the purpose and in the manner specified, is just as effective, so far as his intention is concerned, to create a trust as if the proper technical term had been employed.

But by the decisions of the courts it has become the settled law of this State that such a trust is void, because it is too vague and indefinite to be carried into effect. The uniform course of our decisions is that a trust, to be upheld, must be of such a nature that the *cestuis que trust* are defined, and capable of enforcing its execution by proceedings in a court of chancery. This doctrine has been laid down in a series of adjudications, from *Dashiell v. Attorney General*, in 5 Harr. & J. 320, to *Isaac v. Emory*, in 64 Md. 333. The most prominent of the intermediate cases are Wil-

derman  
Needle  
v. Smith  
show that  
rule  
therefore  
this is  
trust, t  
next of

But i  
precate  
objects  
for that  
no trust  
takes  
the cor  
any pr  
the obj  
trine, i  
contain  
ently s  
do not  
as an  
wholly  
or don  
noted  
Ves. 52

"Wh  
trust p  
is to be  
express  
and qu  
ture of  
as evid  
to crea  
impose  
applic  
tion of

On th  
the cas  
(decide  
then st  
"I co  
words  
of con  
particu  
quest,  
conditi  
clude a  
to act,  
second  
ly, the  
indefin  
And  
he says  
"It i  
in the  
for hol  
may b  
which  
the sam  
and de  
not nec

derman v. Mayor, etc. of Baltimore, 8 Md. 555; Needles v. Martin, 33 Md. 609; and Church, etc. v. Smith, 56 Md. 397. It requires no argument to show that, the trust in this will falls within the rule established by these decisions, and must therefore be held to be void. The consequence of this is that, if we are right in holding this to be a trust, the property goes to the heirs at law and next of kin.

But it has been strenuously argued that, where precatory words are used, the very fact that the objects or parties to be benefitted, or to be selected for that purpose, are uncertain, is conclusive that no trust is created, and in such case the donee takes the property absolutely. In other words, the contention is that no trust arises by force of any precatory words unless there is certainty in the object, as well as in the subject. This doctrine, no doubt, receives support from statements contained in some of the text-books, and is apparently sustained by some of the decisions; but we do not find that the authorities have laid it down as an inflexible rule applicable to all cases, and wholly irrespective of the intention of the testator or donor to create a trust. Lord Eldon, in the noted case of *Morice v. Bishop of Durham*, 10 Ves. 522, went no further than to say:

"Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the courts as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended."

On the other hand, Lord Chancellor Truro, in the case of *Briggs v. Penny*, 3 Macn. & G. 546, (decided in 1851,) deduces the principles from the then state of the authorities thus:

"I conceive the rule of construction to be that words accompanying a gift or bequest, expressive of confidence, or belief or desire or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: First, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

And then, in reference to this third condition, he says:

"It is most important to observe that vagueness in the object will unquestionably furnish reason for holding that no trust was intended; yet this may be countervailed by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from a ben-

eficial interest that there should be a valid or effectual trust. It is only necessary that it should clearly appear that a trust was intended. \* \* \* Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of the trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is no peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt and clear."

He then refers to the fact that in the will before him, as in the will before us, another legacy had been given to the legatee, as clearly showing "that she was not intended to take the residue beneficially," and dismissed the appeal, which was taken from a decree passed by Vice-chancellor Sir Knight Bruce, whose opinion in the case is reported in 3 De Gex & S. 525.

So, in the more recent case of *Bernard v. Minshull*, Johns. Eng. Ch. 276, (decided by Vice-chancellor Sir Page Wood in 1859,) the maxim that a certain subject and a certain object are necessary in order to constitute a trust, where the words used are precatory only, is again examined and explained, and it was again held that, to constitute such a trust as shall exclude the donee to whom the precatory words are addressed, it is sufficient if it appears a trust was intended, although the object of such trust is uncertain and cannot be ascertained. The conclusion reached by this learned judge was that, although the certainty of both subject and object may clearly indicate the existence of a trust, the converse of the proposition is by no means true; and that, however uncertain may be the objects of the testator's bounty, if it clearly appear that such objects were intended by him to have the benefit of the gift, it will exclude the donee, and create a trust.

And, as strongly sustaining the same proposition, reference may be made to the antecedent cases of *Ommanney v. Butcher*, 1 Turn. & R. 260; *Ellis v. Selby*, 1 Mylne & C. 286; *Stubbs v. Sargon*, 3 Mylne & C. 513; and *Corporation of Gloucester v. Osborn*, 1 H. L. Cas. 272.

It is also to be remarked that the distinction between this class of cases, and others in which precatory words have been held not to create a trust, is recognized in 1 Jarm. Wills, (4th Amer. ed. 693, where the learned author says:

"It is to be observed that in all these cases the consequence of holding the expressions to be too vague for the creation of a trust was that the devisee or legatee retained the property for his or her own benefit; and in this respect these cases stand distinguished from those in which there was considered to be sufficient indication of the testator's intention to create a trust, though the objects of it were uncertain—a state of things which,

of course, lets in the claim of the heir or next of kin to the beneficial ownership. In such cases there is no uncertainty as to the intention to create a trust, but merely as to the objects. In the other class of cases it is uncertain whether any trust is intended to be created."

"In this country, also, adjudications are to be found in which the same doctrine is approved. Even in the case of *Pennock's Estate*, 20 Pa. St. 26, where the court decided that the old Roman and English doctrine, that precatory words will be sufficient to convert a devise or bequest into a trust, was not part of the common law of Pennsylvania, they yet held that such words may amount to a declaration of trust when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposition of it to his kindness, justice, or discretion. The case of *Ingram v. Fraley*, 29 Ga. 533, is directly in point. There the decision in *Briggs v. Penny* was approved and followed, and it was held that a trust was created by precatory words, though not sufficiently declared, and that the legatee did not take the estate beneficially, but as trustee for the next of kin.

In short, our examination of the authorities, both English and American, have led us to the same conclusions that were reached by the commentators to Hill, *Trustees*, (4th Amer. Ed.) 116, and which are also cited with approval in *Perry, Trusts*, § 114, note 4. Among the rules there laid down as fairly deducible from the adjudged cases are these: (1) Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching, but a mere discretion in regard to the method of application of the subject, or the selection of the object, will not be inconsistent with a trust; (2) precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise; and (3) failure or uncertainty will be an element to guide the court in construing words of doubtful significance adversely to a trust.

But our own decision in *Taylor v. Plaine*, 39 Md. 58, if not conclusive, goes very far to settle the question now before us. In that case a devise of property, real and personal, to certain named parties, "to be disposed of according to their verbal directions, or the directions of either of them," was held to be upon trust; and, as the terms of the trust had not been declared in the will, a trust arose by operation of law in favor of the heirs and personal representatives of the testator. Several passages in the opinion in that case have a direct application to this. After stating that no positive rule can be laid down which shall determine in all cases what terms or expressions will carry a beneficial interest, or what will create a trust, the court says:

"The words 'trust' and trustees' have, it is true, a defined and technical meaning, and are more generally as well as more properly used, but it is well settled that there is no magic in particular words, and any language which satisfactorily indicates an intention to stamp upon the devise the character of a trust will be sufficient."

Again after comparing the several provisions of the will with each other, they say:

"We think it may be fairly inferred that the testator did not design to give to these donees, who were neither his heirs nor next of kin, but strangers in blood, a beneficial interest in the property, but that they should take it in trust."

The trust failed for uncertainty in the objects, no *cestuis que trust* being named, and the property was adjudged to belong to the heirs and next of kin.

If, after the bequest and devise to Mr. Bowers, the words "in trust" had been used, conceded, and all the authorities show, he would have taken no beneficial interest whatever, by reason of the failure of the trust for uncertainty in its objects. But other words plainly indicating an intention to create a trust are used, and it is manifest from the whole will that the testator never intended to give him this property in his own right and for his own use. We have given our reading of this clause, and we think no one can read this will, or hear it read, without saying at once that the testator never intended to make an absolute gift of the residue of his estate to Mr. Bowers, or to give him any beneficial interest therein. Can, then, the omission of the words "in trust," coupled with the fact that the law, as laid down by the courts, declares that the testator's intentions are too vague and indefinite to be carried into effect, work an absolute gift of the property to one whom he never intended should be recipient of such a gift? A result like this could only be attained by disregarding intention, and relying upon some arbitrary, inflexible, and technical rule of construction which has no foundation in reason; and we have shown that no such rule has been sanctioned by any controlling weight of authority.

The practical effect of the decree appealed from is to give this property to the heirs at law and next of kin of the testator, and we affirm it.

NOTE.—The case presents two questions, first, whether the language used in the will creates a trust at all, and secondly, whether, if it does, the trust so created, is valid and operative, or too remote and consequently void. That the words used are "precatory" and therefore within the general rule on that subject, there can be no doubt. In the words of Lord Eldon: "The cases upon words of recommendation have, I take it, now settled this rule; whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with respect to whom such terms are used are certain,

and the  
trust."  
exposi  
form o  
tation  
author  
tion  
should  
enough  
"not d  
grand  
trust.  
Then  
howso  
to wh  
The p  
the po  
and le  
ever,  
will gi  
childr  
both  
tain.  
A tr  
struct  
the wi  
uncert  
Sir R.  
rule th  
points  
which  
shows  
trolled  
to defe  
Then  
furthe  
trust,  
by En  
They  
by Lo  
though  
many  
deed t  
P. Ar  
been s  
line of  
In th  
accept  
2 Das  
Keigh  
Wynn  
709; s.  
Jacob  
8 Wy  
4 Ma  
5 Sha  
6 Ma  
7 Kn  
8 He  
9 Ead  
Glynn  
38, 226  
Cary,  
437 (18  
Wood  
Clark  
Fin. 51  
(1851);  
v. Kin  
Beav.  
McCor

and the subjects of the property given are also certain, the words are considered imperative and create a trust."<sup>2</sup> And in a later case Lord Eldon reiterates this exposition of the law on the subject.<sup>3</sup> And almost any form of words expressing a wish, hope, desire, expectation, have been held to be precatory words, and to authorize a trust. Lord Thurlow said:<sup>4</sup> "If the intention is clear, what was to be given, and to whom, I should think the words '*not doubting*' would be strong enough." He held however, that a devise to a wife "*not doubting* that she will give what may be left to my grand-children," was not sufficiently certain to raise a trust.

There are two certainties necessary or no words howsoever precatory can raise a trust; a certainty as to what is to be given, and a certainty as to whom. The point in the case last cited was that the wife had the power to spend as much of the estate as she chose and leave as little as she chose. In another case however,<sup>5</sup> the same words, "*not doubting* but that my wife will give it (a copyhold estate) to and amongst my children" were used and the trust sustained, because both the property and the beneficiaries were certain.

A trust, however, will not be created if such a construction is inconsistent with any positive provision of the will.<sup>6</sup> And this limitation may be added to the uncertainties of the subject and the object of the gift. Sir R. P. Arden, Master of the Rolls in 1795,<sup>7</sup> states the rule thus: "Whenever any one gives property and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed, is to be controlled by the party; and that he shall have an option to defeat it."

These words, it will be observed, tend to limit still further the operation of precatory words in creating a trust, but have been generally approved and adopted by English judges as embodying the true doctrine. They are cited and commended by Lord Lyndhurst,<sup>8</sup> by Lord Cottenham, and by Chief Baron Richards, although with some qualification by the latter,<sup>9</sup> and by many of the later English judges and Chancellors. Indeed the rule as stated by Lord Alvanley, (then Sir R. P. Arden,) is the established law of England, and has been so held from 1702 down to 1869 in an unbroken line of adjudged cases.<sup>10</sup>

In the United States the rule has generally been accepted, though the tendency of late years has been to

apply it much more gingerly than formerly. In Indiana it is recognized as law, though not clearly applicable to the facts,<sup>11</sup> in Massachusetts there is a similar recognition of the general principle.<sup>12</sup> So also, in Vermont,<sup>13</sup> and in Tennessee,<sup>14</sup> and in Maryland,<sup>15</sup> and in Georgia,<sup>16</sup> in Florida,<sup>17</sup> in Mississippi,<sup>17</sup> in Connecticut,<sup>18</sup> and in New Hampshire.<sup>19</sup>

In Pennsylvania after having, in 1845, recognized the rule in a well considered case,<sup>20</sup> and in another in 1850,<sup>21</sup> re-affirmed the ruling with reference to the same will, and the same property, the Supreme Court in 1853, still treating the same will, overrules both these cases and says: "We may now add that we know of no American cases in which the antiquated English rule has been adopted."<sup>22</sup>

The objection to the view of precatory and hortatory words as creating a trust, is not confined to Pennsylvania nor to this side of the Atlantic. Lord Eldon, although an authority on the other side, says: "This sort of trust is generally a surprise on the intention; but it is too late to correct that."<sup>23</sup> And Vice-Chancellor Sir Anthony Hart said:<sup>24</sup> "The first case that construed words of recommendation into a command, made a will for the testator, for every one knows the distinction between them."

In America there is a like current of opposition among legal thinkers. Judge Story says: "— In more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but as far as the authorities will allow, to give to the words of a will their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense."<sup>25</sup>

Judge Redfield goes even further than Judge Story in his opposition to the rule under consideration. He says:<sup>26</sup> "This," (meaning that nothing obligatory is meant,) "we think is what is *always* intended by testators, in the use of these hortatory expressions in their wills." We are strongly inclined to the same opinion, although the word "*always*" may be a trifle too sweeping. Every person competent to make a will at all, knows the difference between words of command and words of entreaty, and may fairly be presumed to know his own mind when he makes his will, and to say in it what he means. We fully concur with Vice-Chancellor, Sir Anthony Hart in his remark that: "The first case that construed words of recommendation into a command made a will for the testator."<sup>27</sup> And we think we may safely add that far more than half of the cases that have followed the ruling have done the same thing.

<sup>2</sup> Dashwood v. Peyton, 18 Ves. 41. See also Malin v. Keighley, 2 Ves. 333; Harland v. Trigg, 1 Bro. Ch. R. 142; Wynne v. Hawk, 1 Bro. Ch. R. 179; Brown v. Higgs, 4 Ves. 709; s. c., 5 Ves. 495; s. c., 8 Ves. 561; Tibbetts v. Tibbetts, Jacob R. 317.

<sup>3</sup> Wynne v. Hawkins, 1 Bro. Ch. 179.

<sup>4</sup> Massey v. Sherman, Amb. 520.

<sup>5</sup> Shaw v. Lawless, 5 Clark & F. 129.

<sup>6</sup> Malin v. Keighley, 2 Ves. Jr. 333, 335.

<sup>7</sup> Knight v. Boughton, 11 Cl. & F. 513, 531.

<sup>8</sup> Heneage v. Lord Andover, 10 Price, 230, 264.

<sup>9</sup> Eades v. England, 2 Vern. 466 (1702); Harding v. Glynn, 1 Atk. 469 (1739); Pierson v. Garnett, 2 Bro. C. C. 38, 226 (1786); Paul v. Compton, 8 Ves. 375 (1803); Cary v. Cary, 2 Sch. & Lef. 173, 189 (1804); Forbes v. Ball, 3 Meriv. 437 (1817); Wright v. Atkins, 1 Turn & Russ. 143 (1823); Wood v. Cox, 1 Keen, 317 (1836); Shaw v. Lawless, 5 Clark & Fin. 129 (1839); Knight v. Boughton, 11 Clark & Fin. 513 (1844); Williams v. Williams, 1 Sim. (N. S.) 358 (1851); Briggs v. Penny, 3 McN. & G. 546 (1851); Benser v. Kinnear, 2 Giff. 195 (1860); Shovelton v. Shovelton, 32 Beav. 143 (1863); Irvine v. Sullivan, L. R. 8 Eq. 673 (1869); McCormick v. Grogan, L. R. 4 H. L. 82.

<sup>10</sup> Reed v. Reed, 20 Ind. 313.

<sup>11</sup> Warner v. Bates, 98 Mass. 274.

<sup>12</sup> Van Amee v. Jackson, 35 Vt. 174.

<sup>13</sup> Anderson v. McCullough, 3 Head, 614.

<sup>14</sup> Negroes v. Plummer, 17 Md. 165; Tolson v. Tolson, 10 Gill. & J. 159.

<sup>15</sup> Ingram v. Fraley, 29 Ga. 553.

<sup>16</sup> Lines v. Darden, 5 Fla. 51.

<sup>17</sup> Lucas v. Lockhart, 10 Sm. & M. 466.

<sup>18</sup> Bull v. Bull, 8 Conn. 47; Harper v. Phelps, 21 Conn. 257.

<sup>19</sup> Erickson v. Willard, 1 N. H. 217.

<sup>20</sup> Coates' Appeal, 2 Penn. St. 129.

<sup>21</sup> McKonkey's Appeal, 13 Penn. St. 253.

<sup>22</sup> Pennock's Estate, 20 Penn. St. 268.

<sup>23</sup> Wright v. Atkins, 1 Ves & Beames, 313, 315.

<sup>24</sup> Sale v. Moore, 1 Sim. (1827) 534, 540.

<sup>25</sup> 2 Story Eq. Juris., § 1069.

<sup>26</sup> 1 Redfield on Wills, 718.

<sup>27</sup> Sale v. Moore, *supra*.

The other question considered in the principal case, whether, if a trust be raised by precatory words, it can be held void for uncertainty without holding that the bequest is absolute, and that the trust was not raised at all, is so fully and ably treated in the principal case that we abstain from any comment upon it.

ED. CENT. LAW JOURNAL.

## STATUTE OF FRAUDS—INSTRUCTIONS TO AGENT MEMORANDUM.

HASTINGS v. WEBER.\*

*Supreme Judicial Court of Massachusetts, July 2, 1886.*

1. *Statute of Frauds — Memorandum — Lease — Agent — Telegram.*—In an action of contract for breach of an agreement to take a lease, it appeared that the defendants' agent wrote to the defendants a letter containing a description of the premises, and stating the annual rent for a term of five years; the questions of the letter being whether the premises and amount of rent were satisfactory to the defendant, but the letter did not state or refer to the particular terms or conditions of a lease. The defendants, in answer, sent the following telegram: "If basement included at four thousand, secure five years' lease." A letter sent by the agent to the defendants on the day the telegram was received by him stated that the lease at \$4,000 included the basement, and that he would close the matter the next day. The agent had no authority to accept a lease. *Held*, that there was not a sufficient memorandum in writing to satisfy the statute of frauds; *also held*, that letters written by the defendants subsequently, referring to an incomplete lease, had no bearing on the question.

2. ——. *Instructions to Agent—Disclosure to Third Person.*—Where a principal gives instructions in writing to his agent relating to the leasing of real estate, and the instructions do not include an authority to contract, the disclosure of the instructions to the other party cannot convert them into a memorandum of contract sufficient to satisfy the statute of frauds. •

This was an action of contract for breach of an agreement to take a lease. The defense relied on was the statute of frauds. Hearing in the superior court, before Bacon, J., upon facts which appear in the opinion, who ruled that there was not sufficient evidence of any written memorandum of the contract to satisfy the statute of frauds, and directed a verdict for the defendants. The letter of January 3d, referred to in the opinion, was written by the defendants' agent to the defendants after the receipt of the telegram mentioned, and stated that the lease at \$4,000 per annum included the basement, and that he, the agent, would close the matter the next day.

A. E. Pillsbury, for plaintiff; C. J. Noyes, for defendant.

ALLEN, J. delivered the opinion of the court.

\*S. C., 7 N. East R., 846.

The declaration alleges a contract with the defendants by which the plaintiff agreed to let to them certain premises for the term of five years from the first day of February, 1883, at the yearly rent of \$4,000, and the defendants agreed that they would hire the premises, and execute and accept thereof for such term at said rent, and would pay the rent of \$4,000 a year during said term.

There was no written contract, and the plaintiff relied upon a verbal contract between herself and the agent of the defendants; and the only question presented by the exceptions is whether there is a sufficient memorandum, in writing, of the contract to satisfy the statute of frauds. The memorandum must be found, if anywhere, in the letters of the defendants' agent to them of January 2d and 3d, and in the telegram of the defendants to their agent of January 3d. There is no evidence that the agent had any authority to sign a memorandum, and the only paper signed by the defendants is the telegram. This was sent in answer to the letter of January 2d, and before the letter of January 3d was received by the defendants. It is contended that it is so connected with the letter of January 2d as to incorporate that into itself, and make the letter and telegram together a memorandum signed by the defendant. Assuming, without deciding, that such is the correct construction of the two papers, we think they do not constitute a memorandum of the contract declared on, or of any contract. It is clearly not a memorandum of a completed contract, and the most that can be claimed is that it constitutes an offer by the defendants to the plaintiff, the subsequent verbal acceptance of which by the plaintiff gave it effect as the contract of the defendants. If we could adopt the assumption upon which this argument must rest, and hold that the telegram must be taken to include the letter of January 2d, and that the presentation of this telegram to the plaintiff on January 3d was in legal effect the exhibition of the letter and telegram to the plaintiff by the defendant through their agent, the principal question, and the only one we need consider, would be presented: Does the telegram import a promise by the defendant to the plaintiff to accept a lease described in it and the letter

The correspondence is not between the parties to the supposed contract, but between one of the parties and his own agent, and it is to be construed accordingly. The agent was directed to look for a store for the defendants, and to negotiate for a lease of it. He had no authority, unless from the telegram, to accept a lease, or to make a contract, or to determine any of the terms of a lease or of a contract. His letter informed the defendants that he had been looking at the store of the plaintiff, contained a description of the premises, and stated the annual rent asked for a term of five years, as information to the defendants as the basis of further instructions. The question of the letter was whether the premises and the amount of rent were satisfactory to the defendants. It did not refer to

the particular terms or conditions of a lease; such as, when the term should commence; when the rent should be payable; what alterations should be made in the premises, or what condition they should be put in by the owner; what alterations might be allowed to be made by the defendants; what rights the defendants should have as to underletting, and other particulars which might enter into the lease. The answer was, with brevity of correspondence, by telegraph: "If basement included at four thousand, secure five years' lease." This was obviously intended only as instructions to the agent that, if the rent would be of the amount stated, he should continue his negotiations, and procure a lease, the only contract contemplated, to be submitted to the defendants for their acceptance and execution.

The instructions in the telegram do not exclude but accord with, other instructions, as to the contents of the lease that may have been given by the defendants to their agent; and, as between the parties to the correspondence, they contain in legal effect the additional words, "according to instructions which have been or may be given." Instructions to the agent referring only to the particulars mentioned in the letter to which they were in reply cannot be construed as including a promise or offer to the plaintiff to accept a lease containing only those particulars. The plaintiff had no right to so treat it; and that she did not, in fact, so regard it, appears from her declaration, which alleges that the term was to commence on February 1, and not immediately, as would be implied from the writings; and also from the evidence that she understood that the defendants were not to have the power or underleasing, which could not have been inferred from the writings. Whether a correspondence between one party to a verbal contract, and his agent, before the completion of the contract, can, under any circumstances, constitute a memorandum of the contract, we need not consider. The correspondence in this case shows only instructions for an agent, not including authority to contract, and the disclosure of the instructions to the other party cannot convert them into a memorandum of contract.

The letters subsequent to January 3d, and the lease signed by some of the defendants, but not accepted or delivered, refer to the incomplete contract of a lease, and have no bearing upon the question whether the defendants had agreed to execute the lease, unless as showing that they did not consider themselves under any contract to do so, and cannot go to make up a memorandum of such a contract.

Judgment on the verdict.

## WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	26, 33
ARKANSAS,	5, 37, 41
COLORADO,	8
CONNECTICUT,	10, 19
INDIANA,	28, 29, 30, 39
MAINE,	11, 15
MARYLAND,	27
MASSACHUSETTS,	17, 18, 40
MICHIGAN,	32
NEW HAMPSHIRE,	3, 31, 34
NEW YORK,	12, 13, 16, 22, 36, 38
NORTH CAROLINA,	14, 20
PENNSYLVANIA,	6, 9, 25, 35
TENNESSEE,	7
TEXAS,	21
VERMONT,	1
VIRGINIA,	4, 23, 24
WISCONSIN,	2

1. AGENCY.—*Principal and Agent—Unauthorized Act—Ratification—Assumpsit—Trovee and Conversion.*—Where goods are purchased by A. in the name of B., and on his credit, but without his authority, B. is not liable; and because the goods were shipped in his name, and a bill of them sent to him, it is not a ratification of the unauthorized act when he did not have knowledge that the goods were purchased upon his credit, or that they were not paid for by A., although B. did not notify the plaintiff, when he received the invoice, that the act of A. was not authorized by him. When the plaintiff's property has been wrongfully taken or appropriated, and converted into money or its equivalent, he may waive the tort, and recover in *assumpsit*; but it must appear that the defendant has actually received money to the use of the plaintiff, or that which he considers its equivalent; as a promissory note or money demand. *Saville v. Welch*, S. C. Vt., August 18, 1886; 5 Atl. R. 491.

2. BANKING.—*Draft taken for Collection—Insolvency of Banker.*—The proceeds of a draft received by a banker for collection, will not pass into his assigned estate; the owner of the draft may require payment out of that estate, as against creditors, though no part of it can be shown to be composed of the proceeds of the draft. That the owner of a draft delivered to a banker for collection has proved his claim against the banker's assigned estate, will not deprive him of his right to claim the amount of the draft out of the estate as against creditors. *McLeod v. Evans*, S. C. Wis., May 15, 1886; 22 Rep. 221.

3. BETTERMENTS.—*"Supposed Legal Title."*—One occupying land under a deed which gives him a remainder in fee on condition that he furnishes support for the life tenant there, does not hold the premises under a "supposed legal title," within the statute relating to betterments. *Walker v. Walker*, S. C. N. H., July 3, 1786; 6 East. Rep. 425.

4. CHANCERY PRACTICE.—*Accounts and Reports—Judicial Sales—Trust Deeds.*—When commissioner's report, based upon accounts of long standing and great confusion, is confirmed by lower court it will not be disturbed in the appellate court unless error is apparent. In selling real estate under trust deeds or mortgages, courts of chancery will adopt the terms agreed upon by the parties to such deeds. *Palro v. Bethell*, 75 Va. 825. *Stimpson v. Bishop*, S. C. App. Va., June, 1886; 10 Va. Law Journal, 543.

5. CONFLICT OF LAWS.—*Jurisdiction—Legacy Charged on Land.*—No court, State or Federal, can confer title nor reach nor sell land situated in a State other than where the court is held. *Williams v. Nichol*, S. C. Ark., July 3, 1886, 1 S. W. Rep. 243.

6. CONTRACT.—*Sale—Fraud—Sheriff's Interpleader—Change of Title to Personal Property, Unaccompanied by Change of Possession.*—Property sold on the faith of misrepresentations of fact on the part of the vendee, as to his financial condition, cannot be taken in execution by creditors of the vendee, and may be recovered by the vendor, in a feigned issue, fraud having vitiated the sale. By contract between A., a Pennsylvania tanner, and B., a Boston leather dealer, A. was to buy raw hides, deliver them to B. at the tannery in Pennsylvania, cause them to be marked with a private mark as B.'s property, send bills thereof to B. at Boston, tan the hides for him and then send them to Boston for sale. B. was to pay to A., "as compensation for said tanning, such sums as should equal the proceeds of the sales of said leather, after deducting therefrom the said purchase price of the hides and skins from which the leather was made; also, five per cent. on the gross amount of the sales, freight on the leather, interest at the rate of seven per cent. per annum, and all premiums for insuring the hides;" A. to be liable for all losses. The parties were not to be partners, and the hides were, in every state, to belong exclusively to B.: *Held*, that as to third persons, B. was merely a lender of money, and not a purchaser of the hides, and, therefore, could not hold them as against A.'s execution creditors. *Ensign v. Hoffeld*, S. C. Penn., April 28, 1886; 28 Weekly Notes of Cases, 105.

7. CRIMINAL LAW.—*Larceny and Receiving Stolen Goods—Indictment—Verdict—Instructions—Evidence—Error.*—An indictment framed in two counts, one for larceny, and the other for receiving stolen property, will support a general verdict. On the trial of such an indictment, it is improper to instruct the jury that, if they find the accused guilty, they must specify on which count their indictment is based. It is not a reversible error to instruct the jury that the unexplained possession of recently stolen property is evidence of guilt. *Cook v. State*, S. C. Tenn., June 10, 1886; 1 S. W. Rep., 254.

8. ———. *Reasonable Doubt—Instructions—Subject of Statute Embraced in Title.*—Where the charge to the jury states, among other things, "that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied on to establish the defendant's guilt," the language used is inaccurate, and the metaphor calculated to mislead the jury; for while the court doubtlessly intended to announce the proposition that it was not necessary for the State to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to establish the ultimate facts on which a conviction depended, yet there was great danger of the jury applying the figure to the ultimate and essential facts necessary to conviction. It is no answer that other parts of the same instruction stated correctly the law on the subject of reasonable doubt. The judgment must be reversed. Where the title

of an act clearly expresses one general subject, the addition of subdivisions thereof does not necessarily vitiate the whole title. *Clair v. People*, S. C. Colo., April, 1886, 8 Crim. Law Mag., 184.

9. DAMAGES.—*Eminent Domain—Interest.*—The proper rule to follow to measure the amount of damages a land-owner would be entitled to by reason of the running of a railroad through his premises, is to ascertain what price the property would have brought either at public or private sale before the construction of the railroad, and what it would bring after such construction, the difference being the amount of the damage. In order to arrive at the increase or shrinkage in the market value, there must be a just and fair comparison of the special advantages and the actual disadvantages resulting from the opening and operating of the road and the construction of its works. The damages found bear interest from the time of the taking. *Setzler v. Pennsylvania, etc. Co.*, S. C. Penn., March 1, 1886.

10. DEED.—*Release—Construction.*—Parties cannot be permitted to vary or change the meaning of the plain, unambiguous language used in a written instrument; hence, where a deed says: "All right, title, interest, claim and demand whatsoever, which I, the said releasor, have, or ought to have, in or to a certain tract of land," etc., it is a release which conveys whatever interest the releasor has in the property, and its effect is not destroyed by the statement in the deed that the premises had been theretofore mortgaged to grantor. Whether the grantor in the quitclaim deed intended to release the right to reversion or not, he has in fact done so, and the law will afford him no relief. The condition is irrevocably gone, and plaintiff's title is complete. Grantor subsequently, at the time of his death, had no interest in the property, and there was nothing on which the deed from his administrator could operate. *Hoyt v. Ketchum*, S. C. Conn., June, 1886; 2 N. Eng. Rep. 557.

11. DOWER.—The widow of a deceased mortgagee, who had a dower interest in the premises which she had not released, but which had not been set out to her, cannot convey any part of the premises to a third person to hold as against the administrator of the mortgagee. *Plummer v. Dougherty*, S. C. Me., August 6, 1886; 6 East. Rep. 451.

12. EMINENT DOMAIN.—*Contributory Negligence.*—Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken in the freest use of them in any lawful business, nor expose him to be charged with contributory negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskillfully managed locomotive. *Kalbfleisch v. Long Island, etc. Co.*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 662.

13. EVIDENCE.—*Parol—Written Instrument.*—Evidence that after the time of executing a written contract the parties agreed upon a modification of it, is admissible; but proof of a subsequent conversation between them, in which one of them stated, orally, his understanding of the contract differently from its written terms, and the other did not dissent from his statement, does not amount to such subsequent modification, and is not admissible. *Corse v. Peck*, N. Y. Ct. App., June 1, 1886; 3 Cent. Rep. 611.

14. — *Written Not Variable by Parol—Corporations—Transfer of Stock.*—The intestate died owning a benefit certificate in a mutual insurance corporation, made payable to his personal representative. The by-laws permitted assignment prescribing the formalities. In a contest for the proceeds of the policy between the representative and some of the heirs: *Held*, that parol evidence of an assignment was inadmissible, and that the formalities of the assignment must be strictly followed, the same being intended for the protection of the association. *Elliott v. Whedbee*, S. C. N. C. February, 1886; So. Atl. Rep.

15. EXECUTOR AND ADMINISTRATOR—*Mortgages—Foreclosure—Bonds for Maintenance—Surviving Widow—Demand.*—An administrator of a deceased mortgagee may maintain a suit to foreclose a mortgage, given the husband to secure a bond for maintenance of the husband and wife, though the breach did not occur till after the death of the mortgagee. In such suit it is not necessary to show that the surviving widow had made a demand on the administrator of the deceased mortgagor for support out of the mortgaged estate. *Plummer v. Doughty*, S. C. Me. August 6, 1886; 6 East. Rep. 451.

16. FRAUD—*Fraudulent Representations*—The purchase of stock representing property is a purchase of the property itself. A false and fraudulent representation, as to property of a corporation, of material facts which necessarily affect the value of the shares of stock therein, constitutes a cause of action against a party who induces another, by means of such fraudulent misrepresentation, to purchase such shares. It is not material to such cause of action that the purchase price or money advanced on the faith of the representation be paid to the party making it for his individual benefit. Although the plaintiff is present and examines the property he has a right to rely upon the representation of the defendant as to its extent and boundary, and is not bound to examine the title when defendant professes to know all about it. *Sevenk v. Naylor*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 665.

17. — *Statute of Frauds.*—In an action for procuring credit to be given to another by false representations of pecuniary responsibility, oral representations or assurances are properly excluded; and where no part of the written statement of the party obtaining the goods on credit was untrue, there was not sufficient evidence of a conversion on the part of either defendant. *Bates v. Youngerman*, S. J. C. Mass. June 29, 1886; 2 N. Eng. Rep. 514.

18. GIFT—*Legacy—Remoteness.*—A gift over to persons ascertainable with certainty within the allowed time, with no contingency or uncertainty as to who should finally take, is valid; and where the contingency is one that happened, the validity of the devise would not be affected by the consideration that another contingency might be too remote. So there is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, provided the vesting of the estate in the latter is not postponed too long. *Seaver v. Fitzgerald*, S. Jud. Ct. Mass. March 31, 1886; 2 N. Eng. Rep. 511.

19. GUARANTY—*Commercial Law—Protest—Collateral Security.*—Writing upon a note, "For value

received we guarantee the within note until paid," is an absolute and unqualified contract by each signer of the guaranty to pay if the maker does not. Upon maturity, it is the duty of the guarantors to go to the holder and pay the note, and this without demand or notice. Under such circumstances, no party to the note is released from liability thereon, by reason of any omission to act on the part of the holder. Where, upon taking, as collateral notes indorsed by makers of a joint and several principal note, the holder gives a receipt stating that there is to be "no release from the joint and several note, all are to be held:" the holder assumes no obligation to demand payment, notify indorser, or bring suit on the collateral notes; but is only bound not to act in intentional bad faith, nor to hinder the pledgors in enforcing payment. Where the indorsers of such collateral notes have knowledge, power and opportunity to enforce them against the maker, it is their duty to do so and to protect themselves from loss through delay of the holder to proceed against the maker at maturity; otherwise the negligence of the holder becomes their own and they cannot set off the amount so lost against their liability on the principal note made by them. *City, etc. Bank v. Hopson*, S. C. Conn. May 31, 1886; 2 N. Eng. Rep. 556.

20. INSURANCE—*Life Insurance—Beneficiaries in Mutual Insurance Company.*—A clause in the charter of a mutual insurance company, that the purpose is in part for the "relief of widows and orphans by voluntary contributions," does not mean that the benefit necessarily enures to the widow and orphans. The representative is entitled to recover, in the absence of a valid assignment under the by-laws, for purposes of administration. *Donald v. Benton*, 4 Dev. & Bat. 435; *Etheridge v. Fallin*, 72 N. C., 213; *Wilson v. Sandifer*, 76 N. C., 347; *Baker v. The Railroad*, 91 N. C., 308; *Rogers v. Chestnut*, 92 N. C., 81, cited and approved.) *Elliott v. Whedbee*, S. C. N. C. February, 1886; S. Atl. Rep.

21. MALICIOUS PROSECUTION—*Pleading—Damages—How Alleged—Aider by Verdict.*—A general allegation of damages will admit proof as to damages necessarily resulting from the injury complained of, and which are implied by law. The plaintiff should, however, allege specifically what actual and also what exemplary damages he claims; and, if he fails to do so, a special demurrer will be sustained. In such cases, if the defendant fails to raise the question by demurrer, and the issue of fact is passed upon by the court or jury, the defective pleading is cured by verdict, and defendant is precluded from revising it on appeal. *Moehring v. Hall*, S. C. Tex. June 1, 1886; 1 S. W. Rep. 258.

22. MISTAKE—*Fraud.*—Whether a party was honestly mistaken as to a boundary line, or whether his representations as to it were fraudulently made with knowledge of their falsity, is a question of fact for the jury. *Schuenk v. Naylor*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 665.

23. MORTGAGES—*Debt—Evidence of Debt.*—A mortgage secures the debt, not the note, bond, or other evidence of it. No change in the form of the evidence, or the mode or time of payment—neither a judgment at law on the note or bond, merging the original evidence of indebtedness, nor a recognition of record taken in lieu of the note or bond—nothing short of actual payment or express re-

lease of the debt will operate to discharge the mortgage. This principle is illustrated in the decisions of this court cited in the opinion. The transfer of a debt secured by a mortgage carries with it the security, without any formal assignment or delivery of the latter. *Stimpson v. Bishop*, S. C. App. Va. June, 1886; 10 Va. Law Journal, 543.

24. NEGLIGENCE—*Municipal Corporation—Grade of Street*.—Whilst a lot owner can recover in trespass for the throwing of dirt on his premises by the city authorities in making a street, he cannot sue in damages on the case for the throwing of dirt on the premises by reason of the elevation of the roadway; a change of grade. *Kehrer v. City of Richmond*, S. Ct. App. Va. April 22, 1886; 22 Rep. 219.

25. PARTITION—*Co-Tenant—Improvements—Tenant by Curtesy*.—A., the husband of B., one of the several co-tenants, made valuable and permanent improvements upon a portion of the said land. A bill for partition having been filed, and partition decreed among the parties according to their interests, held, (1) that A., being tenant by curtesy in part, was not, in making the improvements, a mere stranger or volunteer; (2) that, as the improvements were such as were reasonably necessary for the proper enjoyment of the land, the portion of the land so improved should be awarded to the heirs of B., without accounting to the others interested for any portion of the same. It seems that improvements would inure to the benefit of all the co-tenants where one co-tenant undertakes to improve the whole estate, as by erecting a building covering the whole of a city lot. *Kelsey's Appeal*, S. C. Penn. May 31, 1886; 5 Atl. Rep. 447.

26. PARTNERSHIP—*Levy on Partnership Property—Title Acquired Thereby*.—When an execution or attachment against an individual partner is levied on the partnership property, the purchaser at the sale under the levy acquires only the partner's interest in the assets which may remain after the payment of the partnership debts, and which can only be ascertained by an account in equity. "In other words, the effects of a partnership cannot be taken by attachment or execution to satisfy a creditor of one of the partners, except to the extent of his interest in the effects after settlement of the partnership debts. He thus purchases a mere right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which may be ascertained to exist upon a settlement—which may be something or nothing." *Warren v. Taylor*, 60 Ala. 218; *Andrews v. Keith*, 34 Ala. 722; *Daniels v. Owens*, 70 Ala. 297; *Parsons on Part.* (3rd ed. \*359, \*351); *Collyer on Part.* (Wood's ed.) 187, note; "Story Eq. Jur. § 677;" *Farley, Spear, & Co. v. Moog*, S. C. Ala., Dec. Term, 1885-86.

27. PAYMENT—*Evidence of—Promissory Note*.—Where "received in full" is written across the face of a note, the natural inference is that the satisfaction of the note took effect from the date of the latest credit recorded on the back of the note, or because of some additional payment contemporaneously made, and that money paid later by the maker to the payee was applied, not to the receipted note, but to another note between the same parties, on which a balance was due. *Chapman v. Smoot*, Md. Ct. App. June 21, 1886; 5 Atl. Rep., 462.

28. PLEADING—Every pleading must proceed upon some single definite theory, which is to be determined from the general scope and character of the pleading. *Bank of Indianapolis v. Root*, S. C. Ind. June 26, 1886; 8 N. East. Rep. 105.

29. —. *Account Filed as Exhibit—Uncertainties Cured—Set-Off and Counter-Claim—When it May be Replied to a Set-Off*.—Where a copy of an account, which is the foundation of a pleading, is properly filed therewith as an exhibit or bill of particulars, it will cure uncertainties therein. A set-off may be pleaded by the plaintiff to a set-off by the defendant, if it existed at the time of the defendant's set-off was pleaded, although it may not have existed at the time of the commencement of the original action, *Blount v. Rick*, S. C. Ind., June 26, 1886; 8 N. East. Rep. 108.

30. PLEDGE AND COLLATERAL SECURITY.—*Contract—Reduction of Debt—Right to Withdraw Collaterals*.—Where collaterals are given under a contract that the pledgor, in the event of a reduction of the indebtedness by him, shall be entitled to select from the securities pledged an amount equal to the reduction, it is sufficient if the reduction is made in part by rents from property voluntarily mortgaged for such debt, or from the sale thereof; and one to whom he has transferred a part of such securities, less than the amount of such reduction, is entitled to hold the same as against the pledgee, even though no valuable consideration was given therefor. *Bank of Indianapolis v. Root*, S. C. Ind., June 26, 1886, 8 N. East. Rep. 105.

31. PRACTICE.—It is not ground for exception that instructions to the jury are not given in the identical language of a request by a party. *Walker v. Walker*, S. C. N. H., July 3, 1816; 6 East. Rep. 425.

32. SALE.—*Mutual Assent—Partner Offering "To Give or Take"—Acceptance—Conditions*.—An offer by one partner to give a certain sum for the other partner's interest in the firm, or to sell his own interest for the same sum, concluding with the words, "the party purchasing to give sufficient security for the payment of company indebtedness, and for purchase price," which offer was accepted by the other partner, "to sell on the terms mentioned;" Held, not to be a complete sale, and that the first offer was only one of the steps leading to a sale, which contemplated that parties should meet, and complete transaction. *Gates v. Nelles*, S. C. Mich., July 15, 1886; 29 N. W. Rep., 73.

33. TITLE TO LAND.—*Actual Possession of Another—Breach of Peace*.—A person who has, or thinks he has, a title to land which is in the actual possession of another, cannot lawfully take possession without the consent of the holder, even though he commit no breach of the peace. The recent authorities sustaining this position are: *Turnley v. Hanna*, 67 Ala. 101; *Mason v. Hawes*, 52 Conn. 12; S. C., 52 Amer. Rep. 552. *Morris v. Robinson*, S. C. Ala., December Term, 1885-1886.

34. TROVER.—*Conversion—Lien*.—One who has the lawful possession of the personal property of another, does not necessarily have a lien on it for the expense incurred in getting such possession; and his unlawful retention of it, claiming such a lien, in defiance of the owner's right of possession, is a conversion. *Nutter v. Varney*, S. C. N. H., July 30, 1886, 5 Atl. Rep. 457.

35. TRUST.—*Execution for Collection of Funds—Injunction.*—Trusts are peculiarly within the province of a court of equity, and an injunction will be awarded on the application of a trustee to restrain his *cestui que trust* from issuing execution for the collection of trust funds on a judgment in his name. *Reeser's Appeal*, S. C. Penn., May 31, 1886, 5 Atl. Rep. 445.

36. —. *Mortgage—Foreclosure—Purchase by Plaintiff—Agreement to Reconvey.*—An arrangement was made, by the attorney of both parties, in an endeavor to perfect a title, by letter, to the effect that a foreclosure sale was to take place in due and lawful form, and that if the plaintiff, or any one for her, became purchaser, she should go into possession as such, but that at any time within one year "after taking title" she should reconvey to defendant upon being paid the mortgage debt, interest, etc. Held, that plaintiff was entitled to a deed from the referee, and is not liable to account as mortgagee in possession, since she is in as purchaser. *Belter v. Lyon*, Ct. of App. N. Y., June 8, 1886; 7 N. East. Rep., 821.

37. —. *Removal of Trustee.*—Equity has power to remove a trustee for breach or neglect of duty, anything showing a lack of capacity, fidelity, or honesty; but not for any mere error of judgment, or mistake as to the true construction of the will under which he acts. *Williams v. Nichol*, S. C. Ark., July 3, 1886; 1 S. W. Rep., 243.

38. WARRANTY.—*Of Title.*—A disputed and doubtful equitable title is not, as a compliance with a warranty or representation, equivalent to a clear and undisputed legal title; and damages may be recovered for the substitution of the one for the other. *Schwenk v. Naylor*, N. Y. Ct. App., June 1, 1886; 3 Cent. Rep., 665.

39. WAYS.—*Laying Out—Curative Statute—Legalizing Construction of Gravel Road—Injunction—When it will not Lie—Gravel Road Assessment—Curative Act.*—There being a general law authorizing county boards to lay out and construct gravel roads, and the board of commissioners of Wells county having attempted to act under such law, but committed an irregularity in taking the initial steps at a special, instead of a regular session, the act of April 11, 1885 (Acts 1885, p. 178), legalizing their action in constructing such road, is constitutional. The fact that a party assessed for the construction of a gravel road obtains an injunction before a legalizing act is passed, will not avail another person assessed, but not a party to the former action, in a suit for an injunction brought after the curative act is passed. *Johnson v. Wells Co.*, S. C. Ind., June 13, 1886, 8 N. East. Rep., 1.

40. WILL.—*Devise—Heirs—Construction.*—Where the language of a will is, "all my other property, either in money, stocks, bonds, goods, vessels, real estate, or whatever it may be, is to be received in trust for the heirs of my children," followed by provisions for giving the income or life estate to his wife and children, it manifests a desire to have all the property finally go in the same direction. In such a devise the word "heirs" should receive a strict construction, and in case of the death of one of testator's children, his equal proportion of the trust fund should be paid to the heirs at law of such deceased child. *Fabens v. Fabens*, S. J. C. Mass., March 31, 1886; 2 N. Eng., 390.

41. —. *Legacy Charged on Land—Devisee's Liability—Conflict of Laws—Equity will Enforce*

*Liability.*—Where a legacy is charged upon land, the courts of the State where the land is situate have exclusive jurisdiction to protect the legatee. Where land is charged with the payment of a legacy, the acceptance of such land by the devisee makes him personally liable for the payment of such legacy, even though it be greater in amount than the value of the land devised. In such a case equity will enforce payment of the legacy by sale of the land, and at the same time compel the devisee to make up the deficiency, if any. *Williams v. Nichol*, S. C. Ark., July 3, 1886; 1 S. W. Rep., 243.

## QUERIES AND ANSWERS.\*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

### QUERIES.

22. M. is indebted to one of the ice dealers of Youngstown, Ohio, on a bill contracted three years ago; he is irresponsible and unable to pay, being the head and support of a family and entitled to certain exemptions. For the purpose of compelling him and other delinquents to pay old bills, all of the ice dealers of said place entered into a written agreement in the spring of this year, to boycott all persons indebted to any one of them. In pursuance of said agreement, M. was notified that if he did not pay by a certain day that he would be placed upon the "black list," and the ice market closed against him. Being unable to pay he did not comply, and all ice dealers refused to sell him, though tendered the cash for the ice upon delivery. He then made arrangements with a neighbor to buy more than he wanted, and in that way obtained ice for a short time, and until the dealers found that out, when they refused to sell any more to the neighbor. So that, in fact, he has been absolutely unable to obtain any ice during the season. Has he a cause of action at common law? K. & H.

### QUERIES ANSWERED.

Query 39. [22 Cent. L. J. 335.]—A., a married man, in 1878 conveys property without his wife's signature. In 1881 A. is divorced from his wife. By the decree both parties are restored to all their property rights obtained during marriage. Can A.'s wife, after the divorce, set up and claim dower in the property sold by the husband during marriage without her joining. Quote authorities. X. Y. Z.

Answer.—This query is somewhat ambiguous. Property rights obtained during marriage cannot be "restored" by a decree of divorce, since, prior to the divorce, the marriage existed, and in law the rights existed. A dower right does not arise till the death of the husband, and it cannot arise unless the woman was the wife of the deceased at the time of his death. *Chenoweth v. Chenoweth*, 14 Ind. 2; 2 Bishop on Mar. & Div., § 706. A divorce a vinculo always barred dower at common law. 4 Kent Com., 64. If the State statute changes the common law and gives a divorced woman a dower interest, then, of course, she is entitled to a dower interest in the real estate sold by him without her joining. *Forrest v. Forrest*, 6 Duer, 103. S. S. M.

## RECENT PUBLICATIONS.

THE LAWS OF THE INDIANA TERRITORY. 1801-1806, inclusive. Paoli, Ind.: Throop & Clark. 1886.

INDIANA HISTORICAL SOCIETY PAMPHLETS. The Laws and Courts of Northwest and Indiana Territories. By Daniel Waite Howe. Indianapolis: The Bowen-Merrill Co., Publishers. 1886.

We are in receipt of the foregoing works, the former a volume of over 200 pages, in regular law-book style, the latter a pamphlet of twenty-five pages, both printed under the auspices of the Indiana Historical Society. The object of the publication of these volumes, the preservation of the early records of the State, is most praiseworthy, and the Historical Society of Indiana deserves, and will doubtless receive, the thanks of the citizens of the State, and of those who shall come after them, for thus preserving the memorials of the early and trying days of their ancestors.

THE CHURCH AND THE CIVIL LAW.—A Manual of Ecclesiastical Law—With an Appendix of Forms. By Charles B. Howell, L. L. B. Author of "Michigan Nisi Prius Cases etc. Detroit, Chas. B. Howell, 1886.

This is a handsome little volume which we think will prove very useful to persons connected with the management of the secular concerns of Churches, and those acting professionally for such persons. As different as the church and the law are in so many respects, there are many points in their respective orbits in which they may and often do come into contact, and this work is designed especially to inform persons connected in any way with the church of all the points in which religious bodies are likely to be affected, beneficially, injuriously, or indifferently by the ordinary civil law of the land. The subject is one of the great and increasing importance. As the author justly observes in his preface. "The temporalities of the churches in this country are fast increasing in value, and those interested cannot be too careful in preserving their titles inviolate." The only regret we can feel about this book, is that the author has confined himself so closely to Michigan and has not taken in other States as well. As it is however, the book is well executed and will no doubt prove very useful.

## JETSAM AND FLOTSAM.

BRINGING A JURY TO TIME.—"Bailliff," said an Arkansas judge one day last week to the officer in charge of the jury, "will you please inform the jury that there will be a horse-race in Merrick's pasture at 3 o'clock?" The jury had been out for forty-eight hours, but in less than thirty minutes they came into court with a verdict.

CONGRESS has very properly sat down on "contract labor," by prohibiting the use of convicts or aliens on any Government work. Now, let the States arrange for the same thing, and it will be settled completely.

AN EXTREME REMEDY.—We have lately seen it suggested that "an effectual temperance measure, which ought to be adopted by the United States, by each of the States, and by every legislative body, would be to make a single overt exhibition of drunkenness a crime, which, if by a judge, should instantly expel him from the bench; if by an executive official should secure his instant dismissal; if by a congress-

man or member of a State legislature, should subject him to immediate expulsion; and if by a lawyer, should disbar him from the courts." "Let the galled jade wince, our withers are unwrung." We are not a bit afraid, being, in this respect, as immaculate as the ideal husband, of whom it was said by an old woman, that he "doesn't drink no sperets and isn't hard on his clothes." However, for the sake of our professional brethren who are less ironclad, we protest against this proposition as harsh and cruel. We can recall no case in any of the books in which a "plain drunk" was ever visited with so heavy a penalty, except in Shakespeare, (where you can find almost anything), the case of Cassio, who lost his office by "putting an enemy into his mouth to steal away his brains." We always were sorry for Cassio, regarding him as the victim of misplaced confidence in the strength of his head, and the purity of his liquor, as well as of a too rigorous military discipline. If such a rule were enforced in these days it would deplete our army list with a rapidity that could not be even approximated by a "bloody war and a sickly season."

DIAGNOSIS OF DRUNKENNESS.—The following article from the *London Lancet* is given space here because of the high authority of that journal, and because it is a strong illustration of the fact that appearances are often deceptive:

"There is reason to fear that mistakes are not unfrequently made, even by skilled observers, in the recognition of drunkenness, by what may be called 'apparent intoxication.' The unsteady gait, the congested face and neck, the vacant eye, with drooping lid, and even the spirituous breath of apparent intoxication, may one and all be the effects of disease or disturbance of function, which has no necessary connection with the abuse of alcohol in any form. A melancholy instance of blundering in respect to this matter may be cited from the life of the late Colonel Herbing, who was accused of intemperance during his field service at Tonquin, but happily acquitted. Professor Peter, who had opportunities of studying the case of this recently deceased officer shortly before his death, elicited that he was suffering from a malady of some years' standing, which produced cerebral anaemia with such giddiness that he could scarcely sit on his horse. Similar cases are by no means uncommon, and while it is more than ever necessary to denounce the practice of permitting police officers to determine whether a man or woman is drunk or the victim of disease, it is requisite to go much further than this, and to call the special attention of skilled practitioners in medicine to the possibility of being mistaken by erroneous impressions on this subject. Not only will anaemia of the brain, however induced, cause giddiness, but certain forms of defective dissimilation will bring about the same results, together with symptoms still more deceptive."

The article from the *Lancet* is defective in that it fails to point out to the unprofessional, the true, scientific criteria of inebriety. It seems that the "unsteady gait, the congested face and neck, the vacant eye with drooping lid, and even the spirituous breath, may consist with sobriety, and the question remains, how is anybody to know when a man is drunk? If a staggering, red-faced, vacant-eyed, alcoholic-smelling man, is not drunk, who is drunk? The old rule was, that a man was sober as long as he could see a hole in a ladder; the more stringent rule was that he must be able to walk a chalk line. Now it would seem that all signs fail, and, common as drunkenness is, even police courts must not convict without the warrant of a surgical expert.